FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1209

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

JOE STEWART, ROY TOLBERT, JO ANN KELSEY, ISAIAH HATCHER, and ARTIS OSBORNE For Themselves and For All Other Persons Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

MICHAEL A. WARNER
PATRICIA A. BRANDIN
69 West Washington Street
Suite 3200
Chicago, Illinois 60602

FRAZER F. HILDER
EUGENE L. HARTWIG
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202
Counsel for the Petitioner,
GENERAL MOTORS CORPORATION

Of Counsel:
POPE, BALLARD, SHEPARD
& FOWLE
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4200

The Scheffer Press, Inc.—(312) 263-6850

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Petitioner, General Motors Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 4, 1976. (Petition for Rehearing denied on December 3, 1976.)

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 542 F.2d 445 and is reproduced in the Appendix hereto. App. 4.

The District Court's December 15, 1975 Decision and Decree, as amended by a January 12, 1976 Order, is reproduced in the Appendix hereto. App. 20.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1976. Petitioner filed a Petition for Rehearing which was denied on December 3, 1976. App. 19. This Petition for Certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This case is a class action under Title VII of the Civil Rights Act of 1964. The claims determined by the Court of Appeals were that (1) the class of black hourly employees was discriminatorily denied promotions to salaried positions and (2) the class was discriminatorily denied promotions to the position of hourly clerk. The questions presented for review are as follows:

1. In a Title VII class action, can a *prima facie* case of racial discrimination be established solely by undifferentiated work force statistics showing that blacks were statistically underrepresented in higher rated positions, when the *rate of promotion* of blacks to the higher rated positions *exceeded* the ratio of blacks to whites in the work force during the period in question?

2. In a Title VII class action, can racial discrimination in promotions be found when there was no evidence of any identifiable victims of discrimination who met the standard of proof established by this Court in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973)?

3. Can a *prima facie* case of racial discrimination in promotions based solely on undifferentiated work force statistics be rebutted by undisputed evidence that *each vacancy* not filled by a black during the period in question was filled by a white who was better qualified than any member of the class?

4. Is a back pay standard which would permit a monetary award to individuals who are not identifiable victims of discrimination contrary to the remedial provisions of Title VII and the Fifth Amendment guarantee against the deprivation of property without due process?

STATUTORY PROVISIONS

Sections 703(a), (h) and (j) and 706(e) and (g) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2(a), (h) and (j) and §2000e-5(e) and (g), are reproduced in the Appendix hereto. App. 1.

STATEMENT OF THE CASE

This action was filed by five named plaintiffs under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.*), and 42 U.S.C. §1981. The complaint alleged that since 1969, the plaintiffs and a purported class of similarly situated black hourly rated employees were discriminatorily denied promotions to the position of hourly clerk and to salaried positions at Petitioner's Broadview, Illinois Parts Division facility. Prior to trial, the District Court certified a class of approximately 120 black hourly employees solely for the purpose of seeking prospective injunctive relief, but denied class certifi-

cation on the claim for back pay. (Order of 1/17/75; Memorandum Opinion, 3/27/75.)

A. The Undisputed Evidence On The Salaried Issue.

The Broadview facility is a warehousing operation where automobile and truck parts are received both from elsewhere in General Motors and outside sources, placed in stock and then shipped to dealers as orders are received. Employees are classified into either hourly rated or salaried jobs.

The hourly work force is primarily responsible for the physical handling of parts as they are received or shipped to fill orders. From December, 1971, through the date of trial, the number of hourly employees ranged from 426 to 513.

From 1970 to the date of trial, there were from 96 to 100 salaried employees, filling approximately 25 different salaried positions. These included clerical positions such as secretaries, key punch operators and clerks; skilled office positions such as computer operators, order interpreters and traffic rate analysts; supervisory employees such as foremen, general foremen and superintendent; and managerial employees, including managers with responsibility over eight other Parts Division facilities in the North Central Region.

Plaintiffs' complaint alleged that three of the individual plaintiffs and the class of black hourly employees were denied advancement to salaried positions because of acts of discrimination occurring since 1969. At trial the evidence was limited to acts occurring and policies in effect since January 1, 1969.

The District Court found that the named plaintiffs "failed to indicate that they were more qualified than . . . the individuals actually advanced during this period." App. 37. No evidence was offered that any other member of the class of black hourly employees was qualified for but denied placement in any salaried vacancy which had been filled by a white. Instead, the plaintiffs relied upon generalized work force statistics showing that there was a lower percentage of black employees as compared to white employees in salaried positions.

In response to these work force statistics, it was established without dispute that since January 1, 1969, all five hourly employees promoted from hourly positions to salaried positions were black. Even taking account of outside hires, the rate of placement of blacks in salaried vacancies for which hourly employees might possibly have been qualified was:

> 1/1/69 to 8/31/73 (the date suit was filed)—6 blacks out of 14 vacancies or 42.8%.
> 1/1/69 to 5/27/75 (the date of trial)—9 blacks out of 19 vacancies or 47.4%.[1]

Throughout the period from January 1, 1969 to the date of trial blacks averaged approximately 25% of the hourly work force.

Petitioner also presented detailed evidence regarding the manner in which *each vacancy* was filled during the period the Company was charged with discrimination (1969 to the date of trial). This undisputed evidence,

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[1] Reproduced in Addendum A hereto for the convenience of the Court is the statistical summary on the Percentage of Blacks Placed In Salaried Positions which was included in Petitioner's brief to the Court of Appeals.

which is summarized in Addendum B hereto in the same form as presented to the Court of Appeals, established that each vacancy not filled by a black was filled only after affirmative efforts to seek out qualified blacks failed to locate a black with qualifications equal to or greater than those of competing whites.[2]

B. The Undisputed Evidence On The Hourly Clerk Issue.

Plaintiffs also relied on underrepresentation statistics in alleging that they and the class were discriminatorily denied promotions to hourly clerk positions. In response to this claim, it was established without dispute that 28 of the 31 clerk positions were filled by offering the job to the most senior employee in a lower rated job on the appropriate shift. As for the three instances where a factor other than seniority was determinative, it was undisputed that one of the three vacancies was filled by a black and the controlling criterion was typing skills—a wholly objective factor.

The only black employee who claimed at trial that he had been discriminatorily denied a clerk's position was

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[2] In response to the suggestion that Petitioner used subjective criteria which are susceptible to abuse, this evidence also established that the only salaried vacancies to which members of the class of black hourly employees were not promoted were positions for which there were no hourly employees—whether black or white—with the requisite skills (*e.g.*, Secretary, Traffic Clerk and Customer Contact Representatives). Where the absence of skills or substantial prior salaried experience was not necessarily disqualifying and subjective considerations may have played a role (*e.g.*, Level 3 Clerk, Plant Security Officer and Foreman), *9 out of the 11 vacancies were filled by black hourly employees or outside hires.* Thus, blacks benefitted from the challenged policies.

plaintiff Joe Stewart who contended that he should have had the position held by R. Bures on the second shift because Mr. Stewart had more seniority than Mr. Bures. The District Court found, however, that Stewart was in fact offered this vacancy, but declined it. App. 37. No other employee claimed or proved that he was injured by the alleged discriminatory practices.

C. The Opinion Of The United States Court Of Appeals For The Seventh Circuit.

1. The Claim of Discrimination in Promotions to Salaried Positions.

The Court of Appeals found a *prima facie* case of discrimination based on the "statistical finding" of the District Court that 9% of the black employees, compared with 21% of the white employees, were in salaried positions. App. 7. The Court of Appeals held that the failure of the plaintiffs to demonstrate that individual employees had been denied salaried positions because of racial discrimination was immaterial because under Title VII it is not necessary to "prove scienter by showing that in individual cases General Motors consciously excluded black employees from salaried positions simply because of their race." App. 7-8. Rather, the Court held that it is the defendant's burden to demonstrate that the racial disparity was the product of non-discriminatory factors, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The Court of Appeals then held that the Company failed to meet this burden because it utilized a "highly subjective and loosely structured" promotion process which "could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate. . . ." App. 8-9.

In reaching the foregoing conclusions, neither the District Court nor the Court of Appeals addressed the Company's contention that the only relevant statistics are those on the rate of advancement since 1969 and that the District Court's conclusion is irreconcilable with this Court's holding in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). Moreover, neither Court's opinion addressed the Company's rebuttal evidence regarding the manner in which each vacancy was filled.

2. The Claim of Discrimination in Promotions to Hourly Clerk Positions.

The Court of Appeals also affirmed the District Court's finding that the statistical disparity in the clerk's classification created a *prima facie* case of discrimination. App. 6. The Court upheld the District Court's rejection of the Company's bona fide seniority system defense because it found that the District Court's finding that "seniority often served only an ancillary role in determining promotions to the position of hourly clerk" is supported by the record. App. 6. Neither the District Court nor the Court of Appeals, however, addressed the issue of how such a finding of discrimination can be reconciled with the undisputed facts showing that only three positions were filled on a basis other than seniority and one of those was filled by a black, so the statistical make-up of the hourly clerk's position could not possibly have resulted from a departure from seniority.

3. The Remedy.

Based on its conclusions with respect to liability, the Court of Appeals affirmed the District Court's decree which imposes detailed rules on the manner in which

future vacancies shall be filled. The Court of Appeals also reversed the District Court's decision not to award back pay[3] and remanded the case with instructions to determine back pay for the class.

In so ruling, the Court rejected the Company's contention that plaintiffs' failure to show that any employee was injured by the Company's policies precluded a back pay award, because such an argument "is nothing but an attempt to relitigate whether discrimination occurred at all. . . ." App. 11. In setting out the mechanics for the back pay proceeding for the salaried positions, therefore, the Court ruled that it will not be necessary to establish "in individual cases whether a particular person would have been promoted but for racial discrimination," even though such a method may generate "a windfall for some employees." App. 13. Instead, the Court adopted a so-called "test period" approach under which a sum based upon the difference in earnings of a white "control group" and the class members will be divided among the class without regard to whether the recipient establishes individual injury. App. 15.

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[3] As noted, prior to trial the District Court had certified the class of black hourly employees solely for the purpose of prospective injunctive relief, but denied class certification for the purpose of back pay, *supra,* pp. 3-4.

REASONS FOR GRANTING THE WRIT

This case vividly illustrates the need for clarification of the proper use in Title VII class actions of undifferentiated work force statistics. Such statistics necessarily reflect job placements occurring over the course of many years. Their use to measure whether promotional decisions made during a specific time frame discriminated against blacks is wrong. This error is brought sharply into focus in this case because of the failure of the courts below to give controlling weight to those statistics which showed that during the period in question blacks were advanced at a rate significantly in excess of their percentage in the work force. This error was compounded, moreover, because liability was determined without proof that there were any identifiable victims of discrimination.

As a result, the Court of Appeals' decision is in conflict with principles previously enunciated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and with decisions of other circuits. Moreover, of crucial significance, the effect of the Court's reliance upon work force statistical presumptions makes the achievement of racial parity the paramount requirement of the law, thus, undermining the mandate of Title VII to eliminate preferential treatment because of race from employment decisions.

Courts have repeatedly relied upon statistics in Title VII cases but, as shown by the conflicting decisions discussed below, the proper role of statistics, indeed every aspect of the standard of proof applicable to Title VII

class actions, is now in a state of conflict and confusion.[4] It is now imperative, therefore, that this Court fully articulate (1) whether and, if so, under what circumstances, statistics may be used to establish a *prima facie* case of discrimination in a Title VII class action, and (2) what evidence is relevant to rebut that *prima facie* case.

The importance of Supreme Court review of this case is highlighted by this Court's grant of Certiorari in *T.I.M.E.-D.C., Rodriguez*[5] and *Hazelwood School District.*[6] The predominant issue in *T.I.M.E.-D.C.* and *Rodriguez* is whether a seniority system which does not give full credit for company service perpetuates "past discrimination." In that context, the relevance of "undifferentiated statistical evidence" to prove the alleged "past discrimination" has been challenged by the Petitioners. In *Hazelwood,* the Petitioner has questioned the use of undifferentiated work force statistics to support a claim of current hiring discrimination. The present case presents the issue

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[4] According to a recent publication of the Equal Employment Opportunity Commission, there are now almost 120 Court of Appeals decisions involving statistics in job bias cases (1976 BNA Daily Labor Report, No. 227, p. D-1). See pp. 15-18, *infra,* for a discussion of some of these decisions which have wrestled with the issue of the proper role of statistics in a Title VII class action.

[5] *International Brotherhood of Teamsters* v. *United States; T.I.M.E.-D.C., Inc.* v. *United States,* Nos. 75-636, 75-672; *Teamsters Local Union 657* v. *Rodriguez; Southern Conference of Teamsters* v. *Rodriguez; East Texas Motor Freight System, Inc.* v. *Rodriguez,* Nos. 75-651, 75-715, 75-718.

[6] *Hazelwood School District* v. *United States,* No. 76-255.

of the relevance of undifferentiated work force statistics to a claim that current promotional policies are discriminatory. Because this case and the above cases all raise related issues involving the use of statistics to establish a *prima facie* case of discrimination, the Court's decisions in those cases may have a bearing on the instant case.

It is further submitted, however, that the record herein presents important additional issues which the Court should consider. Thus, for example, in *Hazelwood,* the finding of a *prima facie* case was substantiated by proof of "specific discrimination against 16 black applicants" and similar evidence existed in *T.I.M.E.-D.C.*[7] In contrast, this case squarely presents the issue of whether a *prima facie* case based *solely* on statistics can be sustained where there is *no* evidence of specific discrimination against any individual. Moreover, unlike the three cases now before the Court, this case presents a full record on the rate of promotion and the manner in which each vacancy was filled during the period at issue. Thus, this case affords the Court the opportunity to examine specific rebuttal evidence as it relates to asserted *prima facie* cases of discrimination.

Review is requested, therefore, not only because of the conflicts with other authorities created by the Court of Appeals' decision, but also because there is a complete record in this case which raises with such clarity the full range of issues on the applicable standards of proof in

[7] *United States* v. *Hazelwood School District,* 534 F.2d 805, 811 (8th Cir. 1976); *United States* v. *T.I.M.E.-D.C.,* 517 F.2d 299, 307, 314 (5th Cir. 1975).

Title VII class actions which have yet to be resolved by this Court.[8]

I. The Court Of Appeals' Reliance Upon A Fallacious Statistical Inference Conflicts With Griggs v. Duke Power Co., The Decisions Of Other Circuits And The Mandate Of Title VII.

The Court of Appeals found that a *prima facie* case of discrimination was established because the Company had not reached statistical parity in the percentage of blacks in salaried positions (9%) as compared to the percentage of whites in salaried positions (21%). The Court cited *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), in support of this conclusion. App. 8.

In so concluding, the Court of Appeals totally misapplied the *Griggs* test. *Griggs* does not stand for the proposition that policies can be presumed to be discriminatory solely because of the absence of statistical parity in the positions at issue. This Court stressed in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975), that the burden of business justification under *Griggs* "arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.,* has shown that the tests in question select applicants for hire

[8] Because this case raises issues beyond those presented in *T.I.M.E.-D.C., Rodriguez* and *Hazelwood,* Petitioner submits that this Petition should be granted in the normal course. There is a possibility, however, that the Court's opinions in those cases may make the errors in the Court of Appeals' decision herein sufficiently clear that a remand in light of those decisions would be appropriate. Petitioner requests alternatively, therefore, that this Court defer ruling upon this Petition until the *T.I.M.E.-D.C., Rodriguez* and *Hazelwood* cases have been decided.

or promotion in a racial pattern significantly different from that of the pool of applicants." Thus, the *Griggs* test focuses on the *direct causal relationship* between the operation of a specific policy alleged to be discriminatory and its effect on blacks—*i.e.,* did the challenged policy eliminate blacks from consideration at a substantially greater *rate* than whites?

Here, the complaint charged Petitioner with discrimination since 1969. Thus, the test under *Griggs* is whether the challenged promotional policies had an adverse impact upon the class of black hourly employees since that date. The undisputed facts before the District Court are that *all five employees* promoted from hourly positions to salaried positions from 1969 to the date of trial *were black.* See Addendum B hereto. Moreover, even considering the rate at which all salaried vacancies for which hourly employees might have contended they were qualified were filled during the relevant period, including those filled by outside hires, *over 40%* of such vacancies were filled by blacks. See Addendum A hereto; *supra,* p. 5. Throughout this period, blacks constituted *only 25%* of the work force.

Because, under the *Griggs* test, these statistics established that the challenged promotional policies and practices did *not* have a disparate impact upon blacks, no *prima facie* case was shown. Or, put another way, the statistics on the *rate of placement* during the relevant period conclusively rebut any inference which initially might have been raised by the overall work force statistics.

What the Court of Appeals failed to recognize was that the overall work force statistics upon which it relied reflected, more than any other factor, persons who entered

the salaried ranks *before 1969,* many presumably before Title VII was even enacted. Plaintiffs did not contend that they were discriminatorily denied vacancies occurring prior to 1969. Yet, the effect of the Court's decision is erroneously to presume that the *current* policies had a discriminatory effect on the class of black hourly employees, solely because Petitioner had not reached statistical parity in salaried positions *prior* to the date the Company was charged with discrimination. Such a result was not intended by this Court under the *Griggs* standard.

A similar statistical fallacy is inherent in the Court of Appeals' decision on the hourly clerk issue. There, the determinative issue was whether the absence of blacks in the clerk's job was the result of the application of seniority or for some discriminatory reason. The Court of Appeals affirmed the finding of discrimination based on the District Court's finding that seniority was not followed in all cases. But the undisputed evidence at trial established that seniority was determinative in all but three instances during the relevant period. One of these three promotions (or 33%) went to a black, as compared to the 25% black representation in the hourly work force. Thus, the statistical disparity resulted from the application of seniority and not from a departure from seniority in the three instances noted.

Undifferentiated work force statistics have been relied upon in a number of cases in other circuits, many of which were cited by the Court of Appeals. Increasingly, however, these same courts have recognized that the objectives of Title VII are not served by the use of improper statistical evidence and have adopted standards which conflict with the decisions below.

For example, in *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1379-82 (5th Cir. 1974), the Fifth Circuit delineated the limitations on its holding in *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972), one of the principal authorities relied upon by the Court of Appeals in this case. In *Hester,* the Court held that tests and subjective hiring criteria are not violative of Title VII *per se* (497 F.2d at 1381) and rejected the District Court's finding of a statistical showing of discrimination based on work force statistics because there was no showing that the challenged criteria "operate to disqualify Negroes at a substantially higher rate than whites" under the *Griggs* standard.[9] 497 F.2d at 1379-81.

In *Olson* v. *Philco-Ford,* 531 F.2d 474, 477 (10th Cir. 1976), the Court rejected the plaintiff's contention of discrimination in promotions, noting that "[t]he record contains no statistics bearing on promotions" and evidence of work force percentages "in 1969" was irrelevant because those statistics bear "only on a particular time and [have] nothing to do with promotions."

In *Taylor* v. *Safeway Stores, Inc.,* 524 F.2d 263, 272 (10th Cir. 1975), the Court stated that "statistical data should be closely related to the specific issues presented" and ruled that because the rate of hiring for a four-year

[9] The Court in *Hester* also noted that comparisons with general population statistics are of questionable value when considering employees for data typist positions where typing is required because "the general population is not presumptively qualified." 497 F.2d at 1379, n. 6. It is even more unreasonable to presume that the class of hourly employees is presumptively qualified for the numerous salaried positions involved in this case which require substantial skills or extensive prior supervisory and managerial experience. See Addendum B hereto.

period exceeded the percentage of blacks in the hiring area, the plaintiffs failed to prove a *prima facie* case that the challenged practice was discriminatory.

In the recent case of *Roman* v. *ESB, Inc.,* ..... F.2d ....., 14 FEP Cases 235, 242 (4th Cir. 1976), a majority of the Court sitting *en banc* was critical of the reliance on "isolated bits of statistical information . . . divorced from other and contrary statistics" and it refused to find a statistical inference of discrimination for, among other reasons, "the percentage of promotions received by black employees was slightly larger than their percentage in the work force."

By relying upon generalized and irrelevant work force statistics rather than requiring actual proof of discrimination, the Court of Appeals has, in effect, mandated that statistical parity must be achieved for blacks, notwithstanding the rights of others competing for the vacancies. This is not what was intended by Title VII. Section 703(j) of Title VII (42 U.S.C. §2000e-2(j)) expressly states that "[n]othing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group . . . *on account of an imbalance* which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any . . . area or in the available work force in any . . . area." (Emphasis added.) As this provision was explained in the legislative history:

> [T]here is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be, would

involve a violation of Title VII because maintaining such balance would require an employer to hire or to refuse to hire on the basis of race. Interpretive Memorandum of Title VII of H.R. 7152, Submitted Jointly by Senators Clark and Case, Floor Managers, 110 Cong. Rec. 7212, 7213 (1964).

As Congress prophesied, an undue emphasis on whether a racial balance exists in the work force presents employers with an impossible dilemma. The employer must either resist what it views as demands for preferential treatment and windfall damages, therefore, inviting litigation from the Government or minorities; or it must accede to the demands, therefore, inviting litigation from the victims of the preferential treatment.[10]

The purpose of Title VII is to determine whether there are identifiable victims of discrimination who are entitled to relief. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). A reliance on irrelevant statistics instead of the actual effect of the employer's policies as represented by this and other cases will only undermine, rather than further, the intent of Title VII. Review and reversal of this case is necessary to clarify the proper application of the *Griggs* test and to insure that statistics are assigned no more weight than is consistent with fairly and accurately identifying the victims of discrimination.

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[10] See, *e.g.*, *Weber* v. *Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761 (E.D. La. 1976). Also, for a full discussion on the adverse consequences of the statistical parity approach adopted by this and other courts, see pp. 58-76, *Affirmative Discrimination* (Basic Books, Inc., 1st Ed. 1975) by Professor Nathan Glazer of Harvard University.

II. The Court's Finding Of Discrimination Based Solely On Overall Work Force Statistics Conflicts With The Proper Application Of The Limitations Provision Of Title VII.

The charge of discrimination relied upon by plaintiffs to assert Title VII jurisdiction was filed in June, 1972. App. 16. Section 706(e) of Title VII provides that the charge must be filed within 300 days of the alleged violation. 42 U.S.C. §2000e-5(e). The scope of a class action under Title VII can be no broader than that raised in the EEOC charge. *E.g., Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). Therefore, any claim by the plaintiffs or any class member that they were discriminatorily denied promotions prior to September, 1971 (300 days prior to June, 1972) is barred as outside the applicable limitations period. *E.g., International Union, Electrical Workers* v. *Robbins & Myers, Inc.*, ... U.S. ....., 50 L.Ed.2d 427 (1976); *East* v. *Romine, Inc.*, 518 F.2d 332, 336-37 (5th Cir. 1975). Thus, the Court of Appeals' finding of discrimination based on underrepresentation statistics which, as discussed, could only have been the result of events long prior to the limitations period cut-off date is clearly erroneous.[11]

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[11] Although the Court's decision was based solely on Title VII, plaintiffs also raised a claim under 42 U.S.C. §1981 at trial. The relevant limitations period for a Section 1981 claim is five years prior to August 31, 1973—the date the suit was filed. *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476, 488 (7th Cir. 1970). Thus, any claim of discrimination for acts occurring outside of the Section 1981 period is also barred. *Marlowe* v. *Fisher Body Division, General Motors Corporation*, 489 F.2d 1057, 1063 (6th Cir. 1973). It was because of the Section 1981 limitation period that the parties went back in discovery and at trial from the September, 1971 Title VII cut-off date to January 1, 1969.

Neither Court below considered the Title VII limitation provision. Review is, therefore, necessary to resolve the conflict between the inference based on work force statistics and traditional statute of limitations principles.

III. The Court Of Appeals' Finding Of Discrimination Without Proof Of Identifiable Victims Conflicts With The Principles Of McDonnell Douglas Corp. v. Green And The Fourth Circuit's Decision In Roman v. ESB, Inc.

In *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973), this Court held that in an individual Title VII case the plaintiff must, at a minimum, show that he was denied a job for which he was qualified. In this case, the District Court found that the individual plaintiffs "failed to indicate that they were more qualified for promotion than . . . the individuals actually advanced during this period" (*i.e.,* the period 1969 to the present). App. 37. Similarly, the claim of the only plaintiff who contended that he was denied an hourly clerk's position was expressly discredited. App. 37. And there was *no proof* and *no finding* that any other class member was discriminatorily denied an hourly clerk or salaried vacancy.

The Court of Appeals ruled that it was irrelevant that there was no "showing that in individual cases General Motors consciously excluded black employees from salaried positions because of their race." App. 7-8. This conclusion is simply irreconcilable with *McDonnell Douglas.* Because there is no showing that any plaintiff or class member was denied a promotion to a job for which he was qualified, Petitioner is faced with the anomalous result that plaintiffs and the members of the class are entitled to relief, even though none of them would be entitled to relief if they sued as individuals.

The Court of Appeals did not even discuss *McDonnell Douglas* and other courts have summarily dismissed the significance of that case as being directly concerned only with the burden of proof in an individual case.[12] In the recent case of *Roman* v. *ESB, Inc.,* ..... F.2d ....., 14 FEP Cases 235 (4th Cir. 1976), however, a majority of the Fourth Circuit sitting *en banc* expressly held that no discriminatory practice had been proven in a class action because, despite the absence of statistical parity in certain skilled jobs, there was no "showing of qualified black applicants being available and not being hired or promoted into these skilled jobs." The Court cited *McDonnell Douglas* in support of that holding.

The objective of Title VII is to identify victims of discrimination entitled to relief, but when no such individuals have been identified it seems axiomatic that neither individual nor class relief is appropriate. *E.g., Watkins* v. *United Steel Workers,* 516 F.2d 41, 44-45 (5th Cir. 1975). Review of this case is necessary, therefore, to establish that, if statistics are relevant at all, they cannot be sufficient to prove discrimination in the absence of evidence that individuals were, in fact, injured by the alleged discriminatory policies.

IV. The Failure Of The Courts Below To Address The Evidence On The Manner In Which Each Salaried Vacancy Was Filled Conflicts With Fundamental Principles On The Weight To Be Accorded Rebuttal Evidence.

Assuming *arguendo* that the work force statistics relied upon below did establish a *prima facie* case under Title

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[12] *E.g., Rodriguez* v. *East Texas Motor Freight,* 505 F.2d 40, 55 (5th Cir. 1974); *United States* v. *T.I.M.E.-D.C., Inc.,* 517 F.2d 299, 315-16 (5th Cir. 1975).

VII, consideration must be given to the relevancy of and weight to be accorded rebuttal evidence. At trial Petitioner presented detailed evidence on the manner in which each salaried vacancy was filled. (Summarized in Addendum B hereto.) This evidence, none of which was disputed, shows that every salaried vacancy not filled by a black during the relevant period was filled by a white with greater qualifications than any class member. None of this evidence was addressed in either lower court opinion. It is submitted, however, that the failure to give any weight to this evidence is erroneous as a matter of law.

Statistics are only a composite of individual employment decisions, each with its own unique attributes and variables. Thus, as recognized by this Court in *McDonnell Douglas,* where it is possible to examine these individual decisions on their own merit, statistics should not be controlling.[13] Even if a *prima facie* case is established, therefore, the burden merely shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802. Having advanced such a reason, the burden shifts back to the plaintiffs to show that the stated reason is pretextual. 411 U.S. at 804.

In this case, Petitioner established a "legitimate nondiscriminatory reason" why no class member could claim

[13] In *McDonnell Douglas,* 411 U.S. 792, 805 n. 19 (1973), this Court cautioned against undue reliance on statistics as follows:

> We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individual hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

See also, *Ochoa* v. *Monsanto Co.,* 473 F.2d 318, 319-20 (5th Cir. 1973).

discrimination with respect to any vacancy. No matter how many presumptions are derived from whatever source, a finding of discrimination cannot be sustained where such evidence stands unrebutted. If not determinative of the entire case, the evidence on specific vacancies should at least have shifted the burden back to the plaintiffs to produce individualized proof of discrimination with respect to particular vacancies—a burden which they made no effort to carry.

This Court has not had occasion to set out the standards applicable to the proper evaluation of rebuttal evidence in a Title VII class action. As evidenced by the failure of both of the lower courts to address the manifestly relevant rebuttal evidence presented in this case, however, review is required in order to insure that fundamental principles as to the weight to be accorded rebuttal evidence are followed in Title VII class actions.

V. The Standard Adopted By The Court Of Appeals For Awarding Back Pay Is Contrary To The Decisions Of This Court And Of Other Courts Of Appeals And Would Result In An Unconstitutional Deprivation Of Property.

The Court of Appeals' approach to the back pay issue on the salaried claim parallels its approach to the liability issue. Just as it held that it was unnecessary for plaintiffs to show that "in individual cases General Motors consciously excluded black employees from salaried positions simply because of their race" in order to establish liability, the Court of Appeals concluded that it was unnecessary as a prerequisite to back pay to determine "whether a particular person would have been promoted but for racial discrimination," even though this "may generate a windfall for some employees." App. 13. Instead, the Court of

Appeals opted for a fluid recovery type of approach whereby class members would receive a monetary award from a fund generated by comparing the wages of the class and a "control group" of whites. Such an approach is contrary to the decisions of this Court and every other Court of Appeals which has articulated standards on the burden of proof for back pay awards.

The purpose of back pay is to make "persons whole for *injuries suffered*" because of employment discrimination. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421 (1975) (emphasis added). Other circuits have unanimously held that back pay must be limited to actual damages and must be proved with reasonable certainty. *EEOC* v. *Detroit Edison Co.,* 515 F.2d 301, 314-16 (6th Cir. 1975); *Norman* v. *Missouri Pacific Railroad,* 497 F.2d 594, 597 (8th Cir. 1974); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 921-22 (5th Cir. 1973); *Lea* v. *Cone Mills Corp.,* 438 F.2d 86, 87-88 (4th Cir. 1971). It is further accepted that proof of back pay must be based on a showing that a particular class member was qualified for and denied a particular vacancy. *Myers* v. *Gilman Paper Co.,* 544 F.2d 837, 853-54 (5th Cir. 1977); *Hairston* v. *McLean Trucking Co.,* 520 F.2d 226, 232 (4th Cir. 1975); *EEOC* v. *Detroit Edison Co.,* 515 F.2d 301, 316 (6th Cir. 1975); *Norman* v. *Missouri Pacific Railroad,* 497 F.2d 594, 597 (8th Cir. 1974).

None of the authorities cited by the Court of Appeals has adopted its wage averaging formula. For example, in *United States* v. *United States Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975), the Fifth Circuit first noted that "[t]he key is to avoid . . . granting a windfall to the class at the employer's expense. . . ." 520 F.2d at 1055. The

Court then specifically rejected "the indiscriminate black-white wage averaging approach advanced by the plaintiffs." 520 F.2d at 1056. And although the Court of Appeals cited the first decision in *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 721 (7th Cir. 1969), there is no authority in that opinion for the type of wage averaging approach directed in this case. Indeed, a second decision in the *Bowe* case, 489 F.2d 896, 903 (7th Cir. 1973), expressly disapproved of the plaintiffs' back pay proposal for "an allowance based on the average earning rate of all male employees during the appropriate periods" as compared to the female class members.

Finally, the constitutional infirmity inherent in anything other than an insistence upon concrete, individual proof of damage was stated by Judge Bell, concurring in *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 267 (5th Cir. 1974):[14]

> Damage awards must be individualized to avoid constitutional problems which would arise in taking the property of one for another without a showing of loss to the particular recipient.

Accordingly, assuming *arguendo* that liability sufficient to justify back pay was established, this Court should review the standard for determining back pay adopted by the Court of Appeals because it conflicts with authorities of other circuits, the opinion of another panel in the same circuit, and the Fifth Amendment guarantee against the deprivation of property without due process.

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[14] Cited with approval in *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1056 (5th Cir. 1975).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted. In the alternative, it is requested that action on this petition be deferred for consideration of whether this case should be remanded to the court below for further proceedings in light of this Court's forthcoming decisions in *T.I.M.E.-D.C., Rodriguez* and *Hazelwood School District, supra.*[15]

Respectfully submitted,

MICHAEL A. WARNER
PATRICIA A. BRANDIN
Suite 3200
69 West Washington Street
Chicago, Illinois 60602

FRAZER F. HILDER
EUGENE L. HARTWIG
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202
Counsel for the Petitioner,
GENERAL MOTORS CORPORATION

Of Counsel:
POPE, BALLARD, SHEPARD & FOWLE
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4200

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[15] For a full discussion of these alternatives, see *supra,* pp. 11-13 and n. 8.

ADDENDUM

ADDENDUM A

Percentage of Blacks Placed in Salaried Positions

	January 1, 1969 to August 31, 1973			January 1, 1969 to May 27, 1975		
	Blacks	Total	Percent Of Blacks	Blacks	Total	Percent Of Blacks
A.[1]	6	14	42.8%	9	19	47.4%
B.[2]	8	22	36.7%	11	34	32.4%
C.[3]	7	18	38.9%	10	28	35.7%
D.[4]	7	16	43.8%	10	24	41.7%

[1] The statistics in Group A include all those employees who filled entry level vacancies in salaried positions for the period stated. These vacancies are represented by the requisitions introduced into evidence by the plaintiffs as Plaintiffs' Group Exhibit 11, plus Frank Jones who was promoted in 1969 prior to the introduction of the requisition system (Tr. 785). These are the only vacancies for which hourly rated employees might arguably be qualified.

[2] The statistics in Group B include the Group A statistics plus all other salaried positions which the evidence shows were filled during the periods noted, including numerous non-entry vacancies for which the hourly employees were not qualified because the positions required prior related salaried experience and positions filled which, in fact, did not result from vacancies for which hourly employees could be considered. In other words, these statistics give the plaintiffs the benefit of all possible factual disputes, and accordingly, are those statistics which under any possible construction of the evidence are most favorable to the plaintiffs.

[3] The Group C statistics eliminate those positions from the Group B statistics which, in fact, did not result from vacancies for which other employees could be considered. The positions eliminated are:

1. Those filled by F. Jones, W. Edwards, J. Begel and M. Valentino in 1971 by recalling these employees from layoff from salaried jobs (Tr. 713-714).
2. Those filled by D. Kannel and J. Weir in 1974 who were transferred from Milwaukee when the duties they were performing at Milwaukee were transferred to Broadview (Tr. 673-674).

[4] The Group D statistics include all those included in Group C except those persons placed in top management positions of level 7 and above, *i.e.*, R. Rudolph, Area Personnel Director; H. Arnold, Area Traffic Manager; L. Browning, General Manager, Broadview Facility; C. Novotny, General Foreman. The plaintiffs could not possibly contend that these positions, which require years of prior related experience, could be filled by promotions directly from the hourly work force.

ADDENDUM B

ANALYSIS OF SALARIED VACANCIES FILLED DURING THE RELEVANT PERIOD FROM 1/1/69 TO 5/75

The following is an analysis in summary form of the manner in which the Company filled each salaried vacancy during the period from January 1, 1969 to the date of trial.

Date Appointed	Name	Position	Level	Race
LEVEL 3 POSITIONS:				
Clerical:				
3/26/73	Y. Wallace	Data Preparation Operator	3	N

Mrs. Wallace was an outside hire for this position (Pl. Ex. 24).

5/1/73	J. Altheimer	Clerk	3	N

Ms. Altheimer had filled a similar position for the Company in Flint, Michigan (Pl. Gr. Ex. 11—Req. #83).

5/1/74	B. Johnson	Clerk	3	N

Ms. Johnson was promoted to a salaried position from the hourly ranks (Tr. 784; 527-528).

5/16/74	L. Lang	Clerk	3	N

Ms. Lang was promoted to a salaried position from the hourly ranks (Tr. 784; 527-528).

5/16/74	J. Walton	Data Preparation Operator	3	N

Ms. Walton was hired into this position (Tr. 678).

8/26/74	G. Hevia	Data Preparation Operator	3	Sp. Am.

Ms. Hevia was an outside hire for this position (Tr. 678).

Secretarial Positions:

6/10/71	K. Scheck	Stenographer	3	C

In connection with filling this vacancy, the Company canvassed the hourly work force to determine if any employee had the necessary typing and stenographic skills, requested minority employees to refer qualified candidates, and contacted the Urban League and the Illinois State Employment Service for minority referrals. Ms. Scheck was hired because, despite the Company's affirmative action efforts, she was the only qualified applicant (Tr. 782-783).

3/22/71	J. Massie	Stenographer	3	C

Ms. Massie was hired after the same affirmative action efforts made in connection with the above vacancy were taken and it was determined that she was the only applicant with the necessary skills (Tr. 782-783).

3/1/73	G. Barbalace	Stenographer	3	C

Mrs. Barbalace was hired only after the Company contacted the Illinois State Employment Service and Operation Uplift for minority referrals and only after the hourly work force was again canvassed to determine

if any hourly employee had the necessary skills. Mrs. Barbalace had nine years of secretarial experience, three years experience in a related industry, an impressive work record and an educational background in business (Tr. 676-677).

4/1/73	F. Muldoon	Stenographer	3	C

Mrs. Muldoon was hired because she had proficient typing and shorthand skills, prior experience with a transportation company, and was the most qualified of all the applicants. Prior to her selection, the same affirmative action efforts as were taken with the above vacancy were made and failed to produce any qualified minority applicant (Tr. 677-679).

Analysis: Blacks filed 5 of 6 or 83.3% of the Level 3 clerical positions for which no prior salaried experience and little in the way of special skills are required. For this reason, the Level 3 clerical positions are positions that are often filled by hourly employees as is evidenced by the fact that two of the Level 3 clerk positions were filled by blacks from the hourly work force. In addition, the one other of these positions not filled by a black was filled by another minority group member to whom the Company also has a commitment under its affirmative action plan and Executive Order 11246 (Tr. 678-679). In contrast to the clerical positions where there are minimal skill prerequisites, the Company has been unable to fill secretarial positions from the hourly work force because none of the hourly employees had the necessary secretarial skills and experience. As is generally the case with most employers, the secretarial positions were all filled by outside applicants.

LEVEL 4 POSITIONS:[1]

1969	F. Jones	Senior Clerk	4	N

Mr. Jones was promoted from the hourly ranks (Tr. 785).

2/1/70	W. Poole	Senior Clerk—Traffic	4	C

Mr. Poole was transferred from the Level 4 position of Order Interpreter at Broadview to staff the newly created Mid-West Area Traffic Department (Pl. Gr. Ex. 11—Req. #1; Pl. Ex. 24). This transfer at the same salaried job level was necessary in view of the need for persons experienced in office procedures to staff the Traffic Department when it was first formed at Broadview.

1/4/71	J. Vocu	Senior Clerk—Traffic	4	C

In connection with this vacancy Mr. Rudolph canvassed the hourly work force for candidates and specifically requested members of the Concerned Black Workers at Broadview to refer black employees. As a result of these efforts, three black employees were considered for the position (Tr. 399-405). Two of these employees, including the one employee referred by the Concerned Black

[1] In 1971, J. Begel was returned to his position as a Level 4 Plant Security Officer from layoff (Tr. 713-714). Three employees were returned from layoff to positions in the Level 4—Senior Clerk classification: F. Jones, W. Edwards and M. Valentino (Tr. 713-714). Since the employees held these positions prior to layoff, they were not considered to be "vacancies." In 1974, Dennis Kannel was transferred to Broadview as a Level 4 Order Interpreter when the Milwaukee parts facility was closed and the work formerly performed at that location was transferred to Broadview (Tr. 673-674). Therefore, this position was not considered to be a "vacancy."

Workers, declined consideration. The third—Lee Tucker—was not selected because he had no traffic experience and lacked typing skills (Tr. 402-405; 626-628). Mr. Vocu was subsequently selected because he had numerous years experience in the transportation field, some advanced education in traffic and was a proficient typist (Tr. 626-628).

8/7/72	R. Kos	Senior Clerk—Traffic	4	C

In connection with filling this vacancy, which involved handling traffic claims, Mr. Price reviewed the minority skills inventory to determine if there were any qualified black hourly employees. Mr. Price also contacted Operation Uplift and the Illinois State Employment Service for minority referrals. Though some minorities were considered as a result of these affirmative action efforts, none had sufficient qualifications. Mr. Kos was hired because he was the most qualified applicant and had prior experience with a transportation company where he was the assistant office manager and supervisor of the claims section (Tr. 674-676).

5/16/72	W. Butler	Plant Security Officer	4	N

Mr. Butler was promoted to this position from the hourly ranks (Tr. 527-528; 784), after a number of other hourly employees, including plaintiff Joe Stewart who declined the position, were considered (Tr. 764-778).

5/1/74	C. Verpaele	Order Interpreter	4	C

Ms. Verpaele was transferred from a Level 3—Senior Clerk position to the Level 4 position of Order Interpreter (Pl. Ex. 24). This transfer at the same salaried

job level assured that the employee selected was familiar with office procedures and it also furthered the Company's affirmative action goals with respect to females under Executive Order 11246.

Analysis: Two of the six persons or 33% of those selected for Level 4 positions during the relevant period were black. The only category of Level 4 positions where blacks were not selected was in Traffic Department Clerk positions. These positions required prior traffic and/or office experience due to the specialized nature of the traffic function and no blacks could be found who possessed the requisite skills and experience.

LEVEL 5 POSITIONS:

9/1/73	T. Reilly	Customer Contact Representative	5	C

Mr. Reilly was promoted internally from the Level 4 salaried position of Order Interpreter to Customer Contact Representative, a position which required him to contact dealers by phone and in person to help them solve any problems they had in meeting their parts requirements and consequently required familiarity with the parts ordering procedures in the office at Broadview (Tr. 210-212; Pl. Ex. 24). The position of Customer Contact Representative is, thus, essentially an advanced level Order Interpreter position. For this reason, it has consistently been filled by promotion from the Order Interpreter classification, and an hourly employee would not be qualified for promotion directly to this position.

5/1/74	P. Micus	Customer Contact Representative	5	C

Mr. Micus was promoted from the Level 4 position of Order Interpreter to Contact Representative. As in the case of the position filled by Mr. Reilly, above, the Company followed its consistent policy of promoting from the Order Interpreter classification (Tr. 65-66).

8/26/74	K. Pochynok	Nurse	5	C

In filling the nurse's position, Mr. Price first canvassed the hourly work force to insure that there were no qualified nurses who would be overlooked. In addition, he contacted the Illinois State Employment Service for minority referrals and placed an advertisement for the position containing the clause that General Motors is an equal opportunity employer. Ms. Pochynok was hired because she was the applicant with the most impressive credentials, experience, and background (Tr. 679-680).

Analysis: Both of the Level 5 Customer Contact Representative positions were, of necessity, filled with persons who had prior salaried experience as Order Interpreters, and not from the hourly ranks. Prior salaried experience as an Order Interpreter is essential in filling this classification because the Customer Contact Representative is responsible for handling all of the dealers' sophisticated and difficult parts orders. In order to perform this function, knowledge and familiarity with the basic order department procedures is essential. With respect to the Nurse position, an R.N. degree is an obvious job prerequisite and it is not surprising that the hourly work force would not prove to be a viable source of candidates for this position.

LEVEL 6 POSITIONS:[2]

Non-Supervisory Positions:

4/1/70	L. Blecha	Senior Rate Analyst	6	C

Mr. Blecha was transferred from the General Motors Assembly Division in Kansas City where he was a rate analyst to staff the Traffic Department at Broadview when the traffic function formerly performed by the Assembly Division was taken over by the Parts Division (Tr. 618-620). This position essentially involved a transfer of the function previously performed by Mr. Blecha to the Broadview facility. Moreover, the Senior Rate Analyst position requires extensive prior traffic experience (see Job Description, Jt. Ex. 4).

Supervisory Positions:

6/16/70	R. Smith	Supervisor—Material Handling	6	C

Mr. Smith was promoted from within the salaried ranks from the Level 4 position of Order Interpreter to the position of supervisor (Pl. Ex. 24). This was in accordance with the Company's established practice to require prior salaried job experience in the office, preferably in the Order Interpreter position, as a prerequisite to Level 6 supervisory jobs (Tr. 189).

8/1/70	A. Wynn	Supervisor—Material Handling	6	N

[2] In 1974, J. Weir was transferred to the Broadview facility as a Level 6—Supervisor—Material Handling from the Milwaukee parts facility when that facility was closed and the work previously performed there was transferred to Broadview (Tr. 673-674). This position has not been considered to be a "vacancy."

As in the case of Mr. Smith, Mr. Wynn was promoted within the salaried ranks from the Level 4 position of Order Interpreter to the position of supervisor (Pl. Ex. 24; Tr. 739-741).

4/1/72	J. Price	Labor Relations Representative	6	N

Mr. Price was transferred to the Broadview facility from the Detroit parts facility where he had prior related experience as the assistant to the personnel director (Tr. 650-651).

1/16/73	Y. Thurston	Supervisor—Material Handling	6	N

Mrs. Thurston was promoted to the position of supervisor from the hourly ranks. Because this was a departure from the usual progression in filling supervisor positions, Mrs. Thurston was given special training in the office prior to being directly placed in a supervisor position (Tr. 189, 527-528, 784).

Summary: Three of the five (60%) Level 6 positions were filled by blacks. Three of the four Level 6 *supervisory* positions filled during the relevant time period (75%) were filled by blacks. (All of these positions were filled *prior* to suit being filed.) Except for Mrs. Thurston, all of the persons selected for these positions had prior salaried experience with the Company. With respect to the Senior Rate Analyst position, prior salaried experience was essential for the proper performance of a traffic job at this level. It should be noted that in the supervisory jobs where specific skills play less of a role in the selection process than they do in most other salaried positions and where subjective qualities such as leader-

ship ability are important, the Company has a record of promoting blacks at a much greater rate than their representation in the hourly work force. This suggests that to the extent subjective criteria and supervisor recommendations may have entered into the selection process, blacks have *benefitted* and have not, as plaintiffs claimed, suffered any adverse impact.

LEVEL 7 AND ABOVE MANAGERIAL POSITIONS:

Analysis: There was evidence at trial that a number Level 7 or above managerial positions were filled during the relevant period. These positions include (1) R. Rudolph, Area Personnel Director, who was transferred to Broadview in 1969 after nearly twenty years experience with the Company in industrial relations (Tr. 17-20, 515); (2) H. Arnold, Area Traffic Manager, transferred in 1969 to head the newly-formed Mid-West Area Traffic Department (Tr. 618-620; 789-790); (3) H. Browning, Plant Manager, transferred from General Motors, Richmond, Virginia (Pl. Ex. 24; Tr. 674); and (4) C. Novotny, General Supervisor—Material Handling, promoted from Level 6 Supervisor (Pl. Ex. 24). None of these positions could conceivably have been filled by an hourly employee because they all require extensive prior supervisory and managerial experience.

APPENDIX

APPENDIX

STATUTORY PROVISIONS
TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. Section 2000e *et seq.*

Section 2000e-2 [Sec. 703]. Discrimination Because Of Race, Color, Religion, Sex, or National Origin

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended by P.L. 92-261, eff. March 24, 1972.)

* * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are

not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . .

• • •

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. (As amended by P.L. 92-261, eff. March 24, 1972.)

• • •

Section 2000e-5 [Sec. 706]. Prevention Of Unlawful Employment Practices

• • •

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful

employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

• • •

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the

payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title. (As amended by P.L. No. 92-261, eff. March 24, 1972.)

In The
United States Court of Appeals
For The Seventh Circuit

Nos. 76-1079, 76-1080
Joe Stewart, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

General Motors Corporation,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division,
No. 73-C-2663
Bernard M. Decker, *Judge.*

Argued April 15, 1976—Decided October 4, 1976

Before Swygert and Sprecher, *Circuit Judges,* and Campbell, *Senior District Judge.*[1]

Swygert, *Circuit Judge.*

This action was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*,

[1] The Honorable William J. Campbell of the United States District Court for the Northern District of Illinois is sitting by designation.

and 42 U.S.C. § 1981, and concerns claims of racial discrimination in hiring and promotion against General Motors Corporation at its Broadview, Illinois Parts Distribution Center. Plaintiffs are black employees representing the class of black people who have been employed at this facility in hourly rated positions since December 21, 1973. Plaintiffs claim that discrimination exists at the Broadview plant with respect to: (1) promotions to the position of hourly clerk, the most desirable of the hourly rated jobs; and (2) promotions to salaried positions.

Charges were filed before the Equal Employment Opportunities Commission (EEOC) in June 1972 and an action was commenced in the District Court for the Northern District of Illinois in August 1973. The district judge found that defendant's promotional practices violate section 703 of Title VII, 42 U.S.C. § 2000e-2. Accordingly, he issued an injunction designed to prevent future racial discrimination in promotions to the position of hourly clerk and to salaried positions.

In reviewing the district court's decision, we are bound under Fed. R. Civ. P. 52(a) to accept findings of fact unless they are clearly erroneous. *Prince* v. *Packer Mfg. Co.,* 419 F.2d 34, 36 (7th Cir. 1969). The statement that discrimination exists for the purposes of establishing liability under Title VII, however, is as much a conclusion of law as a finding of fact. A distinction must be drawn between subsidiary facts to which the "clearly erroneous" standard applies, and the ultimate fact of discrimination within the meaning of Title VII, which is the decisive issue to be determined in this litigation. *East* v. *Romine, Inc.,* 518 F.2d 332, 338-39 (5th Cir. 1975). Accordingly, we will make an independent examination of whether defendant's conduct constitutes a violation of Title VII.

I. Discrimination in Promotions to Hourly Clerk Positions

The district court found that the position of hourly clerk is the the most desirable hourly job at the Broadview plant, both because it is highly paid and because it is considered a stepping stone to salaried positions. It also found that at the time this action was instituted, twenty-five percent of the workforce at the Broadview plant was black, while none of the twenty-seven hourly clerks were black. It then held as a matter of law that under the circumstances of the case these statistics created a prima facie case of discrimination under Title VII. We agree with this conclusion. Where statistical evidence demonstrates a discrepancy between the racial composition of those promoted to a given job and the pool of eligible applicants which is too great to reasonably be the product of random distribution, the burden should be placed on the employer to show that this disparity is the product of nondiscriminatory factors. *See United States* v. *Local 169, United Brotherhood of Carpenters,* 457 F.2d 210, 214 (7th Cir.), cert. denied, 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972); *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 358 (5th Cir. 1972).

Defendant advances as an affirmative defense that it is utilizing a "bona fide seniority system," expressly exempted from liability under Title Vll by 42 U.S.C. § 2000e-2(b), in filling hourly clerk vacancies. The district court found as a fact, however, that seniority often served only an ancillary role in determining promotions to the position of hourly clerk. Despite defendant's contention that this finding is contrary to the evidence, our examination of the record shows that it has ample support.

Since defendant has therefore failed to rebut the prima facie case which plaintiffs' statistical evidence makes out, we hold that its promotional practices with respect to the position of hourly clerk are discriminatory in violation of Title VII.

II. Discrimination in Promotions to Salaried Positions

Plaintiffs' case that discrimination existed in promotions to salaried positions is also based on statistical evidence. For example, prior to any legal pressure, only two out of ninety-seven salaried jobs were held by black people. As of the time of trial, twenty-one percent of the white employees at Broadview, compared with only nine percent of the black employees, held salaried positions. Given that the district court's statistical findings are supported by substantial evidence, we agree that the plaintiffs have again made out a prima facie case of discrimination.

Unlike its argument in the case of promotions to the position of hourly clerk, defendant does not contend that it is relying on a bona fide seniority system in filling vacancies for salaried jobs. Rather, it admits that promotions to the salaried workforce are awarded on a subjective basis which is intended to recognize merit. It then asserts that the district court's finding of a Title VII violation should be reversed because plaintiffs had failed to meet their burden of demonstrating that individual employees had been denied salaried positions because of racial discrimination.

Defendant's argument misconceives the nature of what must be proved to show discrimination under Title VII. For plaintiffs to prevail, it is not necessary that they prove scienter by showing that in individual cases Gen-

eral Motors consciously excluded black employees from salaried positions simply because of their race. Rather, they need only show that black employees as a group were promoted at a significantly lower rate than white employees. At that point, as we stated earlier, the burden would be on the defendant to demonstrate that racial disparity was the product of nondiscriminatory factors. The Supreme Court has defined this burden in the following way:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

General Motors has failed to meet this test. The district court characterized the promotion process with respect to salaried jobs as "highly subjective and loosely structured." It noted that supervisory recommendations play an important role in the promotion process, but that no significant safeguards exist to ensure that the recommendations are focused on the relevant issues in promotion. Foremen asked to make recommendations have no objective way of rating the employees whom they are evaluating. Moreover, they are never given written guidelines delineating the criteria for which they are supposed to be looking or describing the jobs for which they are making recommendations. Finally, almost all of the foremen at the Broadview plant are white.

We hold that such a system of filling vacancies is not job-related within the meanings of *Griggs*. The process described, while perhaps intended only to recognize merit, is highly susceptible to abuse. While some subjectivity is inevitable in filling jobs of executive character, the total lack of objective standards at Broadview could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment. In condemning promotional systems where employees of a minority race have been excluded by a process in which objective standards are lacking, we are in accord with a number of other courts. *See, e.g., Muller* v. *United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir.), *cert. denied*, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 240 43 (5th Cir. 1974); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 368 (8th Cir. 1973); *Rowe* v. *General Motors*, 457 F.2d 348, 358-59 (5th Cir. 1972).

We therefore affirm the district court's holding that defendant's promotional practices with respect to salaried positions violate Title VII.

III. Remedies

A. The District Court's Decree

The district court issued an injunction designed to prevent future racial discrimination in employment at the Broadview plant. We affirm all of the decree except for subsection (A)(1)[2] calling for vacancies in hourly positions to be filled by the employee with the

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[2] Subsection (A)(1) states in pertinent part: Defendant is hereby ordered to fill all vacancies in hourly positions by offering the position to the employee with the highest seniority status on the shift at Broadview on which the vacancy occurs.

highest seniority on the shift on which the vacancy occurs. The record shows that while about two-thirds of the hourly clerk's jobs are on the day shift, about two-thirds of the black hourly employees work on the night shift. Therefore, a rule that seniority can only be used to obtain a promotion within the same shift on which it was accrued will have the effect of locking a majority of the black employees who have suffered discrimination into an inferior status. Accordingly, the decree should be modified to call for vacancies in hourly clerk positions to be filled by the employee with the greatest seniority, regardless of on what shift he is working or accrued that seniority.

B. Backpay

1. *General Principles*

Though plaintiffs asked for backpay as a part of the remedy to be imposed for a Title VII violation, the district court never addressed this issue. Since we find this claim to be meritorious, we remand this case to the district court with instructions to award backpay within the constraints of the guidelines which we will lay down.

In *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975), the Supreme Court held that:

> [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination. (footnote omitted.)

In the absence of special factors, therefore, backpay is to be awarded when a Title VII violation is found. Otherwise, there would be little incentive for employers to obey the statute; a recalcitrant employer could continue

plainly discriminatory practices until compelled to stop by a federal court's injunction without suffering any penalty for his blatant disregard of the law. *Albemarle,* 422 U.S. at 417, 95 S.Ct. 2362. Moreover, backpay is necessary in order to effectuate the statutory goal of compensating the victimized employee and placing him in as good a position as he would have been had he not been subject to discrimination. *See Albemarle,* 422 U.S. at 418, 95 S.Ct. 2362; *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 252 (5th Cir. 1974).

The "special factors" which would prevent a backpay award have been narrowly construed, and usually include only circumstances where state legislation is in conflict with Title VII. They do not include the fact that the employer lacked specific intent to discriminate and therefore arguably was operating in good faith, or that the computation of the award will be difficult. *See Pettway,* 494 F.2d at 253-54, 260.

Defendant does not attempt to delineate any special factors which might support suspension of a backpay remedy in this case. Rather, it asserts that backpay should not be awarded because "[t]he plaintiffs have failed to show a single employee who can claim he was injured by the Company's policies." This argument is nothing but an attempt to relitigate whether discrimination occurred at all, and we must reject it. Since our own examination of the record shows no special circumstances, we hold that the class which plaintiffs represent is entitled to backpay and proceed to a discussion of the mechanics of computing an appropriate award.

2. *The Mechanics of the Award*

The major difficulty in attempting to compute a backpay award in a case such as this one is that

the subjectivity of defendant's method of filling job vacancies renders impossible anything like a precise calculation of the pecuniary effects of discrimination. In light of the uncertainty which clouds the task before us, we must set down three general rules: (1) unrealistic exactitude is not required; (2) ambiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; (3) the district court, far closer to the facts of the case than we can ever be, must be granted wide discretion in resolving ambiguities. *See Pettway,* 494 F.2d at 260-61; *United States* v. *United States Steel Corp.,* 520 F.2d 1043, 1050-55 (5th Cir. 1975).

It is with these rules in mind that we will discuss some of the problems that will face the district court on remand. The first issue which must be clarified is whether backpay should be awarded on an individualized basis to particular employees or on a classwide basis to be divided among the entire group which plaintiffs represent. Where possible, an individualized remedy should be utilized because it will best compensate the victims of discrimination without unfairly penalizing the employer. *See United States Steel,* 520 F.2d at 1055. In the case of the discrimination in regard to promotions to the position of hourly clerk, it should be possible to make individualized awards based on the seniority of black employees. A black employee denied promotion who can show that he had more plant seniority[3] than a white employee given an hourly clerk's job should receive the difference in pay between what he did receive

[3] We wish to emphasize that total plant seniority, rather than seniority on any one shift, should be utilized in making this calculation.

and what he would have received as an hourly clerk. While this method will not reconstruct what would have happened in the absence of discrimination, since seniority played only an ancillary role in determining who would fill hourly clerk vacancies, it will do as fair a job as any in compensating the victims of discrimination without granting them a windfall. Moreover, defendant should be estopped from objecting to such a remedy since it claims that promotions to these positions were in fact handled on the basis of seniority.

In determining the appropriate award to be made to black employees who were unfairly denied promotions to salaried positions, however, the utilization of an individualized method of calculation is impossible. Because General Motors had no objective standards by which to measure whether a given employee deserved a promotion, deciding in individual cases whether a particular person would have been promoted but for racial discrimination would lead the district court into a "quagmire of hypothetical judgments," *see Pettway,* 494 F.2d at 260, in which any supposed accuracy in result would be purely imaginary.

Therefore, it is necessary to use a classwide procedure in awarding backpay as compensation for defendant's failure to promote black employees to salaried positions because of their race. While such a method may generate a windfall for some employees who would have never been promoted had vacancies been filled on a nonracial basis and undercompensate the genuine victims of discrimination by forcing them to share the award with their undeserving brethren, it is the best that can be done under the circumstances. In any event, as Judge Tuttle has noted, "[a]ny method is simply a process of conjectures." *Pettway,* 494 F.2d at 261. Given a choice

between no compensation for black employees who have been illegally denied promotions and an approximate measure of damages, we choose the latter. Moreover, there is precedent for such a choice both in this circuit and in others. *See Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 721 (7th Cir. 1969); *Pettway*, 494 F.2d at 259-61; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971).

Once a decision is made to use a classwide rather than an individualized remedy, the determination of which employees are entitled to be included in the class receiving backpay becomes crucial. The district court should place an initial burden on an individual employee to give a history of his employment at Broadview, to list the jobs he was denied because of discrimination and their pay rates, and to produce any evidence showing that he was qualified for those jobs. An employee attempting to make this showing should have access to any of defendant's records concerning the Broadview plant which he requires. Once this showing has been made, the burden shifts to General Motors to demonstrate by clear and convincing evidence that the employee would not have received those promotions because of factors unrelated to discrimination. *See Pettway*, 494 F.2d at 259; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1379-80.

The district court must then arrive at a method for calculating the amount which the class, now defined, is to receive. Courts confronting this issue have developed a number of techniques to approximate the monetary effects of discrimination. *See Bowe* v. *Colgate-Palmolive Co.*, 489 F.2d 896, 902 (7th Cir. 1973); *United States Steel*

Corp., 520 F.2d at 1055-56; *United States* v. *Local 416, Wire & Metal Lathers*, 328 F.Supp. 429, 443-45 (S.D.N.Y. 1971); *Stamps* v. *Detroit Edison Co.*, 365 F.Supp. 87, 121-22 (E.D.Mich. 1973), *rev'd on other grounds sub nom., Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975). We approve of the use of some variation of the "test period" approach utilized by this court in *Bowe*. The district court should trace over a period of time the history of a group of white hourly employees which is comparable to the group of black employees constituting the class receiving the backpay award. By determining which members of the control group achieved salaried status, how high within the salaried ranks they rose, and what their increases in salary were, it will be possible on remand to estimate for that period the increment in salary which the black hourly employees as a group would have earned had they been permitted to advance to salaried positions. This figure will serve as a benchmark for computation of the actual award.[4]

The final step which must be taken in calculating both the individualized awards on the basis of seniority and the classwide award is to determine the appropriate period of time for which backpay is to be granted. Title VII contains an explicit statute of limitations for backpay liability, *see* 42 U.S.C. § 2000e-5(g), providing that backpay shall only accrue for a period beginning two years prior to the filing of a complaint

[4] This figure should be adjusted to avoid double counting of backpay accruing from denial of promotions to the position of hourly clerk, which will already have been accounted for in the individualized awards.

before the EEOC.[5] Since plaintiffs demonstrated an ongoing course of discriminatory conduct by defendant prior to any action before the EEOC, the initial date of the period for which backpay is to be awarded should be set by the statute of limitations at exactly two years prior to the filing of the complaint before the EEOC in June 1972.[6] The termination date of this period will be different for each type of backpay. Since the district judge refused to stay pending this appeal the pertinent parts of the decree dealing with promotions to the position of hourly clerk, the termination date for the individualized awards should be December 15, 1975, the date the decree was entered. He did stay those parts of the decree providing injunctive relief with respect to promotions to salaried positions, however, and the termination date for the classwide award should therefore be the date on which he vacates the stay after acknowledgement of the disposition of this appeal.

These dates will have different significance for the calculation of the final awards, depending on whether an individualized or a classwide procedure is being utilized. In computing backpay for employees who were unfairly denied promotion to the position of hourly clerk, the district court should compare the employment record of each hourly employee with company records to determine

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[5] This statute of limitations is effective for all actions for which charges are filed before the EEOC after March 24, 1972.

[6] This is the date referred to by defendant. Plaintiffs note that while two of the named plaintiffs filed charges in June 1972, the third, Hatcher, did not do so until May 1973. We hold that the filing by two of the named plaintiffs in June 1972 was enough to satisfy 42 U.S.C. § 2000e-5(g).

whether that employee was entitled to promotion on the basis of seniority during the period between June 1970 and December 15, 1975. If so, that employee should receive the difference between what he was paid and an hourly clerk's salary for the period between the time he should have been promoted and December 15, 1975.

In the computation of the classwide award, the specific beginning and ending dates of the appropriate period will be unimportant. Rather, the significant fact is that the period will be approximately six and one-half years long. The district court should reach a final figure by multiplying the increment in salary which the white control group earned during the test period by the ratio of six and one-half years and the length of the test period.[7]

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[7] A numerical example may help explain the process by which we are directing the district court to proceed. Suppose fifty black employees are admitted into the class which suffered discrimination in obtaining promotions to salaried positions. The district court should select a test group of fifty white hourly employees and designate a test period. Suppose it selects a test period of three years and finds that the test group earned an increment of $100,000 over that period by virtue of the promotion of some of the members to salaried positions. Finally, suppose the length of the backpay period, which cannot be precisely ascertained until remand, turns out to be exactly six and one-half years. The class of black employees would be entitled to an award of $100,000 multiplied by 2.17, the quotient of six and one-half years divided by three years, for a total of $217,000.

The district court might have to make further adjustments if it could not find a group of white employees exactly equal in number to the class of black employees or if some black employees were not in the recipient class for the full period between June 1970 and the revocation of the stay.

The district court may employ the services of a special master in performing the calculations which we have outlined. *See Pettway,* 494 F.2d at 258. We would urge the parties to avoid the need for appointment of a special master, however, by negotiating an agreement pursuant to the principles we have outlined. *See Pettway,* 494 F.2d at 258; *Johnson* v. *Goodyear Tire & Rubber Co.,* 349 F.Supp. 3, 18 (S.D.Tex. 1972), *aff'd in part on other grounds,* 491 F.2d 1364 (5th Cir. 1974).

The judgment of the district court is affirmed except as noted in part III(A) of this opinion and the cause is remanded for further proceedings consistent with part III(B) of this opinion.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 3, 1976.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Sr. District Judge*

JOE STEWART, et al., *Plaintiffs-Appellees Cross-Appellants,* No. 76-1079 & 1080 v. GENERAL MOTORS CORPORATION, *Defendant-Appellant Cross-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (73 C 2263)

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

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*The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois is sitting by designation.

IT IS ORDERED that the petition for rehearing in the above-entitled cause be, and the same is hereby, Denied.

NOTE: Judge Walter J. Cummings, Judge Wilbur F. Pell, Jr., and Judge Philip W. Tone disqualified themselves from any consideration of the matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOE STEWART, et al.,
Plaintiffs,
vs.
GENERAL MOTORS CORPORATION,
Defendant.
No. 73 C 2263

MEMORANDUM OPINION

This action, brought under Title VII of the Civil Rights Act of 1964, concerns claims of racial discrimination against General Motors Corporation at its Broadview Parts Distribution facility. Plaintiffs Joe Stewart, Roy Tolbert and Isaiah Hatcher are black employees at the above plant and also represent the class defined by this court as "All Negroes employed in hourly rated positions by defendant General Motors Parts Division at its Broadview, Illinois Parts Distribution Center as of or since December 21, 1973."

The Broadview facility is essentially a warehousing operation where parts are received both from company and outside suppliers, placed in stock and then shipped to dealers as orders are received. It also serves as headquarters for the Chicago Parts Distribution Center and the North Central Region of the Parts Division. This facility is the largest non-union facility operated by General Motors in the United States.

The present Title VII complaint focuses on promotional procedures with respect to two types of positions: (1) salaried jobs; (2) several jobs paid on an hourly basis and labeled for convenience in this trial as "hourly clerk". Plaintiffs contend that General Motors' practices in filling these positions discriminate against them and the class they represent.

The present suit was tried before this court from May 27 to June 2, 1975. Many witnesses testified and a substantial amount of documents and exhibits were submitted. The court has also had the benefit of extensive briefs and memoranda supplied by counsel.

After consideration of all these presentations, this court finds that adequate evidence has been offered to indicate that General Motors Corporation has in fact violated 42 U.S.C. § 2000e-2 of Title VII of the Civil Rights Act of 1964 in its promotional practices at the Broadview, Illinois plant.

I. Promotion to Hourly Clerk

It is contended by plaintiffs that the post of hourly clerk serves as a stepping stone to advancement to the salaried positions and supervisory roles. Statistical evidence of promotional patterns at Broadview gives some

credence to this charge,[1] and in any case, the position is a desirable one for its freedom from manual labor.

At the time of the filing of this lawsuit in August, 1973, approximately 25% of the plant work-force was Negro. Yet none of the twenty-seven hourly clerks was a black. When viewed under the circumstances of this case, this presents a *prima facie* case for violation of Title VII.[2]

As the Fifth Circuit declared in *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972), with respect to similar statistical evidence of G.M. promotional patterns,

> "[F]igures of this kind, while not necessarily satisfying the whole case, have critical, if not decisive, significance—certainly, at least in putting on the employer the operational burden of demonstrating why,

[1] Of the 39 workers whose hourly clerk positions terminated between 1960 and 1973, 17 were promoted to the salaried level positions at General Motors. The stepping stone nature of the post is even more apparent if the three workers who retired and the two who died and the one who was discharged are eliminated from the total.

[2] As of June, 1975 three of the thirty-one clerks were blacks. These three all serve on the less desirable night shift. All twenty day clerks are white. While evidence of post-suit hiring practices need not be considered by the court in finding a violation of Title VII, this court notes that the current disparity (25% of the workforce is black but blacks only constitute 9.6% of the hourly clerks) would also constitute a *prima facie* case for finding a violation of the act.

> on acceptable reasons, the apparent disparity is not the real one."

Other circuits, including the Seventh Circuit, are in accord. *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1316-17 (7th Cir. 1974); *United States* v. *United Bro. of Carpenters & Joiners, Loc. 169*, 457 F.2d 210, 214 (7th Cir. 1972); *Rogers* v. *International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975); *Muller* v. *U. S. Steel Corp.*, 509 F.2d 923 (10th Cir. 1975).

General Motors seeks shelter from the impact of these statistics under the umbrella of Section 703(h) of Title VII, which provides the following defense:

> "[I]t shall not be unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ." (42 U.S.C. § 2000e-2(h).)

Although the inconclusive legislative history indicates that Congress left the deciphering of a *"bona fide* seniority system" to the courts, *see Note, Last Hired, First Fired, Layoffs and Title VII*, 88 Harv.L.Rev. 1544, 1550 (1975), that term cannot be so stretched to cover the limited seniority system in effect at Broadview.

The evidence indicates that seniority in fact has often served only an ancillary role in determining promotions to the position of hourly clerk.

Defendant's 1973 Affirmative Action Program on its face indicates that seniority serves primarily as the tie-breaking factor when other criteria are inconclusive:

> "All individuals employed on an hourly basis are eligible for advancement to higher rated positions . . . and when ability, merit, and capacity are equal, em-

ployes with the longest service are given preference."

Testimony from Mr. Rudolph, the Broadview personnel director, confirms that this indeed was company policy:

"By Mr. Meites:

"Q. Mr. Rudolph, to your knowledge, has the company ever set forth as its stated policy that in promoting, in determining what people to promote from hourly positions—that in determining whom to promote from hourly positions, the company follows a policy substantially as follows: that employees are promoted on the basis of ability, capacity and merit, and only when those factors are equal is seniority considered?

"A. That sounds similar to the statement that is in there. I don't know if it is word for word.

"Q. But that is the substance of the statement, a statement of the company's stated policy on promotion, is that correct?

"A. I believe that would be right, yes." (Tr. 511)

Perhaps more significant than the expression of the written goals is the testimony indicating that in fact seniority has frequently been ignored in promotional decisions. In at least three of seven recent instances, seniority has not been followed.

At times defendant sought to assert that senior black workers had in fact declined unrecorded offers of promotions to hourly clerk. It is at least questionable whether these offers were in fact made, as demonstrated in the following colloquy:

Mr. Meites: "But if, in fact, defendant followed its record-keeping procedures, Exhibit 22 correctly shows that Mr. Barksdale, although he had more

seniority than Mr. Bures, was not offered the job, is that correct?"

Mr. Rudolph: "If that record does reflect the situation accurately, yes."

Furthermore, even to the extent that seniority is utilized at Broadview, this court is concerned with the discriminatory potential of certain company practices in applying seniority. General Motors claims that since the positions of power truck driver and maintenance men were paid at the same level as clerks, a clerkship would not be considered a promotion. Employees in those positions were not offered jobs as clerks unless they expressed an interest in a vacancy. But since vacancies are not posted at Broadview, it would be difficult for workers to be aware of the availability of a clerkship.

Yet it is clear that the hourly clerk position should be viewed as more desirable than the other two jobs. It is less physically onerous. And significantly, it is not a dead end job, but one that has often proved to be a stepping-stone to salaried and supervisory posts.

General Motors has emphasized that blacks fill 31.4% of the other jobs paying at the hourly clerk rate. On the first shift, 37.5% of the power-truck drivers and 33% of the maintenance men are black, and 33% of the second shift power truck drivers are also black. In these positions the black workers are slightly over-represented.

But once in an "equivalent" job such as power-truck driver or maintenance man, there is no ready means for a worker to use his seniority to get into the clerical posts. The black workers in these positions are of necessity among those blacks with the greatest seniority, and among those who would otherwise be most eligible for the clerkships.

The equivalent pay given the maintenance men and power-truck drivers in no manner makes up for the loss of opportunity for entrance into the more desirable hourly clerk jobs. The net effect of this G.M. practice is to take many high seniority blacks out of the pool of workers eligible to become clerks.

As noted above, General Motors now contends that the hourly clerk positions are filled by the utilization of a *bona fide* seniority system, and thereby seeks exemption from the damning fact that no black worker was given a clerkship prior to the institution of this action. But at best General Motors can be said to have only used an approximation of a seniority system.

General Motors has also emphasized its Affirmative Action Programs which stress ability, merit, and capacity over pure seniority. However, it is conceded that on at least several occasions, clerkships were given without any consideration of seniority. General Motors cannot have it both ways. It cannot utilize a system in which seniority may be freely replaced by largely subjective factors, and then plead that the discriminatory statistics should be ignored because seniority has also been used in filling clerkships.[3]

The *bona fides* of a seniority system can be discovered in the results it produces. "Obviously one characteristic of a *bona fide* seniority system must be lack of discrimi-

---

[3] In short the frequent substitution of subjective factors for seniority forswears the *bona fide* seniority defense. And by deciding promotions on the vague criterion of "ability, merit and capacity", G.M. utilizes for clerkships the same practices that this court finds, *infra, to* have violated Title VII with respect to the salaried positions at Broadview.

nation." *Quarles* v. *Phillip Morris, Inc.*, 279 F.Supp. 505, 517 (E.D. Va. 1968).

This court has noted that there were no black hourly clerks among a workforce one-quarter black prior to the institution of legal action to redress this grievance. This court has noted that in fact seniority has been bypassed in three of the last seven promotions to hourly clerks. And it further notes that official plant policy in fact places "ability, merit and capacity" over seniority as critical promotional factors. Yet, despite the avowed reliance on these factors, the defendant has made no effort to canvass its workforce to learn of the specific abilities and interests of its employees. And finally, the court notes that General Motors' policy excludes from consideration for hourly clerkships a group of employees including those blacks with the greatest seniority. Taken together this fails to depict a *bona fide* seniority system.

Defendant relies on cases which hold that a seniority system violates Title VII only if it is applied in a discriminatory manner. *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309, 1317 (7th Cir. 1974); *Jersey Central Power & Light Co.* v. *Local Union 327, IBEW*, 508 F.2d 687 (3d Cir. 1975); *Swint* v. *Pullman-Standard*, 8 E.P.D. 5984 (N.D. Ala. 1974). Indeed the Seventh Circuit has held in *Waters* that statistical disparity in various job levels is permissible if it is the result of a proper seniority system. But neither this holding nor the conclusion of the Third Circuit that

> "a facially neutral company-wide seniority system, *without more*, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices," *Jersey Central, supra*, at 710,

bears on the instant fact pattern. For it is clear that segregation at the hourly clerk level is not a mere result of past employment practices.

The court in *Jersey Central, supra,* strongly relied on by defendant, maintains that "the only evidence probative in a challenge to a plant-wide seniority system would be evidence directed to its *bona fide* character." 508 F.2d at 706. This court finds the requisite lack of *bona fides* in the system described above, one where no black was made an hourly clerk prior to the inception of this action.

II. Promotion to Salaried Positions

The salaried positions at the Broadview plant reveal a long-run under-representation that is as severe as in the case of the hourly clerks. When the EEOC charges were first brought, only five out of ninety-eight salaried positions were held by blacks; by the time of the filing of this suit, eight of one-hundred salaried employees were Negro. The percentage of Negro salaried employees has increased during the course of the present controversy. In 1970, prior to any legal pressure, there were only blacks in two of ninety-seven salaried positions; by the end of 1974 twelve of ninety-two employees on salary were black. However, all but two of these blacks held positions in the lowest ranks of the salaried positions.[4]

---

[4] Of course the post-filing changes in hiring, effected while G.M. was under serious legal assaults, should not be relied on in deciding the nature of G.M.'s conduct prior to this action.

These statistics have been presented to the court in many correlations, ratios, and formats in an effort to induce a variety of conclusions. As pointed out by defendant, it is evident that in recent years blacks have been elevated to salaried levels at a rate somewhat greater than that indicated by their percentage in the total work-force. The portion of black employees in salaried positions has risen to 9%. The last five hourly employees to be promoted to the salaried ranks have all been black.

On the other hand, it is also clear that significant statistical imbalance remains. White employees are still far more likely to hold salaried posts (21% v. 9%). The addition of several more blacks at salaried positions is not enough to be statistically significant. Moreover, at the time of the suit, blacks held only 8% of all salaried posts, in contrast to their 25% share of the work-force. Thus, while there is statistical evidence that the rate of black accession to the salaried levels has improved during the period General Motors has defended this suit, plaintiffs have made the necessary statistical showing of discriminatory result for a *prima facie* case. *Waters* v. *Wisconsin Steel Works of Int. Harvester Co., supra; Rowe* v. *General Motors Corp., supra,* at 358.

Defendant does not attempt to argue that the discrepancy in the ratio of black salaried personnel is due to the reflection of past discriminatory employment practices in a *bona fide* seniority system. Indeed, seniority plays no significant role in promotion to the salaried levels, and thus is neither an issue nor a defense for this part of the case.

The defendant has elaborated in some detail its stated policy for filling salaried vacancies. When a vacancy occurs, the company canvasses the work force for quali-

fied employees, reviews personnel files and the so-called "minority skills list", goes over employee-interest forms and skills questionnaires, and solicits recommendations from supervisors and management personnel. The final decision lies with the plant manager, but his choice must be approved by the EEO coordinator (presently a Negro) and the head of the affirmative action program. General Motors also does recruiting of minority employees in local high schools and colleges, and maintains an "open door" policy under which an employee is free to discuss career objectives with management personnel.

It is also evident that the company does not make any official announcement of vacancies to its workers. It does not provide employees with any description of available jobs nor any list of the qualifications and prerequisites for salaried posts. The company conducts no regular rating system for its employees, and asserts that there is no advantage given to those employees who showed the initiative to fill out the special salaried position application forms. The company seems to rely heavily on supervisor recommendations. But the supervisors are merely asked to identify hourly employees with special skills, and are not asked to select particular employees with respect to specific positions. The criteria used for determining promotability are at best vague and ill-defined.

Taken as a whole the practices of General Motors in filling salaried positions at Broadview are rife with susceptability to discriminatory practices. When this discriminatory potential is viewed alongside the actual resultant under-representation of Negroes in salaried positions, this court is compelled to find that General Motors

has violated Title VII by these practices. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

This court does not, nor need it, assert that it was the intention of General Motors to foster discrimination by these practices.

> "Under the Act, practices, procedures, or tests neutral on their face, or even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co., supra,* at 430.

But it does find that the company's promotion policy is tellingly similar, both in nature and in result, to its system which was condemned by the Fifth Circuit in *Rowe* v. *General Motors, supra,* at 358-59. There the court stated:

> ". . .[W]e think it clear that the promotion/transfer procedures as applied violate Title VII in several particulars which can be briefly capsulated:
>
> (i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)
>
> (iii) Those standards which were determined to be controlling are vague and subjective.
>
> (iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
>
> (v) There are no safeguards in the procedure designed to avert discriminatory practices."

Supervisory recommendations undeniably play a significant role in the promotion process. Barry McBride, the former plant manager, testified that it was the foremen who supplied the two or three critical names used in the selection process. Foremen were asked to supply the names of employees with "potential for promotion", and were not limited to those employees directly under their supervision.

This process can only be characterized as highly subjective and loosely structured. There were no significant safeguards to insure that the recommendations would be focused on the relevant issues in promotion. The foremen had no purely objective ratings of the employees to go by, since the company only undertook formal review of the performance of supervisory workers. The foremen were never given written guidelines to assist them in their evaluation; indeed they were not informed of the specific job for which they were making recommendations. They could hardly know what to look for since they never knew the official job descriptions or personal criteria used.

The courts have regularly condemned this sort of subjective supervisory recommendation. The Fifth Circuit has condemned "supervisory recommendations based on esoteric standards never revealed to the discriminatees." *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444 (5th Cir. 1974). Likewise, the Tenth Circuit has found objectionable the use of "hunch judgments rather than specific criteria." *Muller* v. *U.S. Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1975). In this district, Judge Prentice Marshall has noted "[witnesses for both sides] agreed that supervisory ratings are not a fair measurement of an employee's suitability for promotion. Their view is shared by the courts." *United States* v. *City of Chicago*,

385 F.Supp. 543, 561 (N.D. Ill. 1974). *See also U.S.* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973).

In the context of the Broadview plant, the innate unfairness of subjective supervisory recommendations is exacerbated by the discriminatory potential of the situation. Until recently, all Broadview foremen were white; there are still only two Negro foremen out of eighteen. In *Rowe* v. *General Motors Corp., supra,* at 359, the court commented:

> ". . .[W]e. . .recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action."

It is not necessary for this court to find that white supervisors are unavoidably biased in their recommendations of black subordinates in order to note that in the present situation, the outcome has been disproportionately few recommendations. Nor is it necessary to resolve the dispute between the parties as to whether foremen at Broadview have the power to totally veto a worker's chances for advancement. It is sufficient to observe that foremen recommendations are a vital part of procedure that has had inequitable consequences.[5]

In a similar manner this court must condemn the absence of objective criteria for advancement into the sala-

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[5] No evidence was presented of any situation in which foremen recommendations were not followed.

ried ranks. An employer has the prerogative to set his own, non-discriminatory, standards for various positions in his enterprise. But in the context of the Broadview plant, "potential for promotion" does not represent any meaningful criteria and easily becomes a subterfuge for discrimination. As another court has noted:

> "There can be no question about the impropriety of a promotional system dependent upon supervisory recommendations uncontrolled by clearly delineated and objective job criteria where the discriminatees have demonstrated a conclusive case of discriminatory job standards. Such a system is patently illegal under Title VII." *Baxter* v. *Savannah Sugar Refining Corp., supra,* at 441 n.3.
>
> "The Act imposes upon employers . . . an affirmative duty to devise and implement pertinent objective criteria for determining what applicants for promotion or transfer are qualified to fill particular vacancies." *U.S.* v. *Jacksonville Terminal Co.,* 451 F.2d 418, 453 (5th Cir. 1971).

Defendant has cited cases where courts have correctly recognized that some subjective evaluation may be necessary in a promotional system. But these courts also acknowledge the potential for abuse in subjective standards. The existence of a discriminatory effect is the determinative factor. "[S]ubjective hiring procedures are not violative of Title VII *per se.* Title VII comes into play only when such practices result in discrimination." *Hester* v. *Southern Railway Co.,* 497 F.2d 1374, 1381 (5th Cir. 1974); *see also Rogers v. International Paper Co.,* 510 F.2d 1340, 1345 (8th Cir. 1975); *Waters* v. *Furnco Constr. Corp.,* 9 EPD 7042 (N.D. Ill. 1975). We have here both the subjective procedures and the resulting discrimination.

By failing to post notices of job vacancies and providing no effective channel through which ambitious employees could seek advancement to salaried positions, General Motors augmented the discriminatory impact of its selection process. It is conceded by the defendant that the salaried position application forms were disregarded in the hiring procedure. Without posting there remained no way a worker could bring himself to the attention of management with respect to a specific slot at the opportune moment. The 1973 Affirmative Action program committed the company to the posting of specific salaried openings, but for some reason this practice was subsequently dropped.

This court finds that in the circumstances of this case, the failure to post job opportunities has discriminatory impact and violates Title VII. *U.S.* v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973); *Rowe* v. *General Motors Corp., supra,* at 358;[6] *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377 (4th Cir. 1972).

Promotional practices such as the above which result in the perpetuation of employment segregation can only escape judicial condemnation upon a showing of business urgency.

> "When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes on-going dis-

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[6] Defendant attempts to distinguish *Rowe* by asserting that the 5th Circuit did not compel the type of posting system wherein promotion was limited to those workers who specifically applied for the posted position. But this court does not require of G.M. any more in the way of posting than did the 5th Circuit; providing sufficient information about the nature and availability of job vacancies and the mechanics of application.

crimination, unless the incidents are limited to those that safety and efficiency require." *Local 189, United Papermakers & Paperworkers* v. *U.S.*, 416 F.2d 980, 994 (5th Cir. 1969).

"[T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971).

General Motors cannot hope to pass this "business purpose" test.[7] Posting of vacancies and job qualifications, periodic objective employee review, specific criteria sought in recommendations, etc., are all common business practices, which would hardly cripple the operations of the Broadview plant. If anything, given previous indications of employee discontent at this location, fairer and more comprehensible hiring practices would do much to improve morale.

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[7] General Motors attempts to advance specious arguments such as its insistence that posting would injure plant morale by compelling supervisors to inform employees when they had been considered and rejected for a promotion. Seemingly G.M. contends that workers are more contented when kept in total ignorance of promotional practices, job-advancement opportunities, and the contents of their occupational records. This court cannot accept the idea that employees prefer a system where advancement descends as inexplicable manna from a benevolent management.

III. The Individual Plaintiffs

While this court is satisfied that the evidence shows that the promotional practices at Broadview have been generally discriminatory in effect, the individual plaintiffs Stewart, Hatcher and Tolbert have not offered sufficient evidence that they suffered discrimination distinct from the class which they represent.

Stewart and Hatcher did manifest to their superiors an interest in promotions to the salaried ranks. But the obstacles they encountered along the paths to such promotions were no different than those which confronted all other employees at Broadview. These plaintiffs have stressed to the court their educational attainments, but have failed to indicate that they were more qualified for promotion than either the individuals actually advanced during this period, or all the other members of their class who encountered similar discrimination.

Conflicting testimony was presented to the court as to whether plaintiff Stewart was in fact offered a promotion to hourly clerk. The weight of the evidence indicates that this indeed was the case. While this does not undercut the finding that the promotional practices at Broadview are discriminatory, it does indicate that this particular plaintiff is not entitled to any unique damages.

For these reasons, the court finds that plaintiffs Stewart, Hatcher and Tolbert are entitled to share in the remedy offered to the entire class that they represent, but do not merit any special award.

IV. Remedy

In accordance with the above findings, it is hereby Ordered, Adjudged and Decreed as follows:[8]

Decree

(A) Hourly Positions

It is adjudged that defendant General Motors has failed to utilize a *bona fide* seniority system at its Broadview facility, and has discriminated against Negro hourly employees in determining promotions, and that defendant has violated Title VII of the Civil Rights Act of 1964.

(1) Defendant is hereby ordered to fill all vacancies in hourly positions by offering the position to the employee with the highest seniority status on the shift at Broadview on which the vacancy occurs. Defendant may designate hourly positions which require special skills and which shall be filled in accordance with the provisions of part (B) of this decree.

(2) In determining the employee with the highest seniority status [for the purpose of filling the position

[8] The court considers it worthy of attention that the present decree in effect does little more than require General Motors to implement the carefully considered promotional practices and *bona fide* seniority system which the company has insisted to be its actual employment policy. The main additional thrust of the decree is the requirement that General Motors follow certain procedures which will assure that its promotional decisions and practices are clearly perceived by all the members of the plaintiff class, and are in accordance with the professed policy.

of hourly clerk],* defendant is required to consider all workers on the shift on which the vacancy occurs holding positions at equivalent wage and employment levels to the vacancy in question. Employees presently at such equivalent levels are to be offered any vacancy in accordance with their individual seniority dates on the present seniority lists.

(3) Defendant is required to provide each employee at Broadview complete descriptions of all hourly positions, including all specific skill prerequisites and other employment criteria and the wage rate applicable.

(4) Defendant is required to inform each employee of his seniority date and to inform upon request each employee of his relative seniority status in the total workforce and on the shift to which he is currently assigned.

(5) Defendant is required to provide adequate notice to all employees of all educational and training opportunities offered to enable workers to obtain the skill prerequisites for promotions at Broadview. This shall include the posting of notices of such opportunities in conspicuous places throughout the plant, and an annual mailing to each employee which shall inform him of his eligibility for these programs.

(6) Defendant is required to individually notify any employee otherwise entitled to a promotion by reason of seniority, who is passed over for lacking the requisite skills for a vacancy, indicating the grounds for such decision.

* The bracketed language was included as an amendment to the decision by order of the Court dated January 12, 1976.

(7) Defendant is ordered to desist from the use of "home-made tests" for the determination of employee qualifications. Any test utilized for such determination shall be a standardized examination of professionally recognized validity, and shall be administered by personnel adequately trained and qualified in the administration of such tests.

(B) Salaried Positions and Skilled Hourly Positions

It is adjudged that the defendant has utilized methods for the filling of salaried vacancies at its Broadview facility which discriminate against Negro employees in violation of Title VII of the Civil Rights Act of 1964.

(1) Defendant is hereby ordered to provide to all employees at Broadview complete written descriptions of all salaried and skilled hourly positions, including all specific skill prerequisites and other employment criteria and the wage rate applicable, as well as the selection procedures utilized.

(2) Defendant is ordered to post conspicuously throughout the Broadview plant notices of salaried vacancies reasonably in advance of the time that consideration of persons for these positions shall begin. Such notices must contain a reasonably specific description of the position, the responsibilities involved, the qualifications required, and the approximate rate of pay for the position. The timing and other conditions of filing shall assure that the hourly employee is given equal consideration for the position with all other persons.

(3) Defendant shall also provide hourly employees with salaried and skilled hourly position application forms with respect to each salaried and skilled hourly vacancy and shall designate where and when and with whom the application shall be filed for particular openings.

(4) Defendant shall additionally provide employees with forms whereby they can indicate in writing in advance of any vacancy their interest in and qualifications for any of the positions described in the information distributed in accordance with paragraph (B) (1). Defendant shall indicate on such forms that it is the responsibility of each employee to keep the personal information on such applications current.

(5) Defendant shall consider for all vacancies in salaried and skilled hourly positions all employees who have submitted either the interest form or the salaried application forms.

(6) Defendant shall not be limited in the filling of these positions to the employees who submit the interest form or the application forms as provided in paragraphs (B) (3) and (4). Defendant shall be allowed to solicit supervisory recommendations for qualified employees. But such supervisory recommendations shall be permitted only in response to requests specifically indicating the nature of the position and the criteria of employment. Such supervisory recommendations shall be entered upon standardized recommendation forms and shall become part of the employee's record.

(7) Defendant shall be required to provide for periodic rating of all hourly employees upon specified and standardized criteria and scales of performance.

(8) All information regarding an employee's performance, including periodic ratings, supervisory recommendations, discipline and attendance records, shall be made available upon request to the employee in question. Defendant shall promulgate procedures whereby an employee shall be enabled to supplement his record with clarifying materials of his own submission.

(9) Any hourly employee who submitted a salaried or skilled hourly application for a specific position and who did not receive such position shall be entitled to receive from the defendant notification of the final disposition of the vacancy. Additionally, upon request the employee shall be given a brief statement justifying the selection of the employee chosen for such vacancy.

(10) Defendant is required to adequately inform all employees of all educational and training opportunities offered to enable workers to obtain the skill prerequisites for salaried and skilled hourly positions at Broadview. This shall include the posting of notices of such opportunities in conspicuous places throughout the plant, and an annual mailing to each employee which shall inform him of his eligibility for these programs.

(C) General Matters

(1) In order to facilitate the resolution of differences and disputes that may arise under this decree, there shall be established at the Broadview facility an EEO Committee. The EEO Committee shall consist of three representatives of management, three members of the plaintiff class and a neutral member to be selected by the members of the committee, or failing agreement, designated by the court. All questions regarding the implementation of this court's decree and all written complaints pursuant to paragraph (C) (2) of this decree shall, before submission to the court, first be brought before the EEO Committee which shall in an expeditious fashion attempt to resolve such matters amicably and informally. This court retains the ultimate jurisdiction over the resolution of all disputes pursuant to this decree, and whenever any issue arises that cannot be resolved by this committee, any party shall have the right

to immediately refer said issue to the court or the court's designate for resolution.

The fees and expenses of the neutral member of the EEO Committee shall be paid by defendant.

(2) Defendant is ordered to notify members of the plaintiff class currently employed at the Broadview facility of their right to file with the company written complaints as to procedures and practices respecting the filling of employment vacancies subsequent to the date of this decree. Such written complaints shall be preserved by defendant and submitted to this court as part of its periodic report. Defendant shall be entitled to submit a written reply and explanation of its actions.

(3) Defendant is hereby ordered to submit periodic reports to this court indicating the nature of its compliance with and implementation of this decree. Such reports shall be submitted twice annually at a minimum. Said reports shall indicate and explain any deviation from pure seniority in the filling of hourly positions not designated as skilled hourly positions, and shall include any written objections filed by members of this class to the selection of salaried employees. Said reports shall also include samples of all forms utilized in annual ratings, solicitation of supervisory reports, and copies of all materials mailed to the members of plaintiff class in pursuance of this decree.

(4) Defendant shall mail to all members of the plaintiff class a copy of this opinion and decree.

(5) Defendant shall promptly and in good faith implement the provisions of this decree, with the effective date of such compliance to be not later than 45 days from the date of the final decree.

(6) Plaintiffs shall recover from defendant the costs of this action, including reasonable attorney's fees.

Plaintiffs' counsel shall submit a fee petition and bill of costs within a reasonable time after the entry of this decree.

(7) This court will retain jurisdiction until such time as the defendant has changed its promotional practices in the manner provided for in this decree.

ENTER:

/s/ Bernard M. Decker
United States District Judge

DATED: December 15, 1975.

Supreme Court, U. S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

No. 76-1209

In the Supreme Court of the United States

OCTOBER TERM, 1976

GENERAL MOTORS CORPORATION,
Petitioner,

vs.

JOE STEWART, ROY TOLBERT, JO ANN KELSEY, ISAIAH HATCHER, and ARTIS OSBORNE
For Themselves and For All Other Persons Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. MEITES
33 North Dearborn, Suite 1410
Chicago, Illinois 60602

FREDA R. MERRITT
30 West Washington, Suite 1339
Chicago, Illinois 60602
Attorneys for Respondents

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-5581

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should this Court review the factual findings of the district court, as approved by the court of appeals, that plaintiffs had established a violation of Title VII by showing discriminatory promotional policies as evidenced by an absolutely segregated work force in the hourly clerk's position, a salaried work force that is overwhelmingly

white and procedures that are "ripe with susceptability to discriminatory practices?"

2. Is otherwise probative evidence on the work force produced by petitioner's promotional practices barred by a statute of limitations?

3. Does this Court's decision in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), limit evidence in a Title VII class action solely to a one-to-one matching of individual black class members against white incumbents and require the trial court to ignore evidence establishing that the practices used in filling the positions are discriminatory and that the resulting work force is virtually segregated, where matching is impossible because the employer had no objective standard to measure whether a given employee deserved a promotion?

4. Is it consistent with Title VII and due process for back pay to be awarded on a basis where each class member must individually come forward and where because of defendant's wrongdoing rating individual class members against white incumbents is impossible and would mean no compensation whatsoever?

STATEMENT OF THE CASE

This is the third court of appeals decision condemning the promotional policies and practices of petitioner General Motors Corporation. See also *Senter* v. *General Motors Corp.,* 532 F.2d 511 (6th Cir. 1976); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972). As in the other two cases, plaintiffs proved by direct testimony that defendant's promotional policies resulted in two levels of discrimination at the Broadview facility. First, black hourly employees were treated less well than white employees in terms of access to promotions to the preferred hourly positions. Second, black employees did not have

equal opportunity for promotions to salaried positions in the office and supervisory roles at the plant.

This class action[1] came on for trial in June, 1975. The trial court, after hearing the testimony of some fourteen witnesses, found that petitioner's policies and practices violated Title VII of the Civil Rights Act of 1964. The district court found that in filling salaried vacancies petitioner did not make any announcement of openings provided no job descriptions and no application procedure, conducted no regular rating systems, relied heavily on supervisory recommendations to identify persons to be considered for promotion under a "procedure that is highly subjective and loosely structured" and supplied the supervisors with criteria for recommendations that are "at best vague and ill defined." (App. 30, 32.) Procedures in determining promotions to the desirable position of hourly clerk were found no better. (App. 27). The discriminatory potential of these procedures was corroborated by the results they produced: a completely segregated hourly clerks work force from which blacks were totally excluded and a salaried work force that was virtually all white, despite the presence of a number of highly qualified blacks in the plaintiff class of hourly employees. A finding of discriminatory procedures was entered, and a broad, injunctive decree was issued to remedy this discrimination. (App. 38-44.) However, the request of the plaintiff class for back pay[2] was denied without discussion.

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[1] The trial court had previously certified this matter as a class action under Federal Rule of Civil Procedure 23(b)(2), on behalf of all black hourly employees at the Broadview facility.

[2] Although the court had originally certified the class only for injunctive relief, the plaintiffs in their post-trial submissions renewed their application for class treatment of their claim for an award of back pay. This request was not addressed by the district court.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, and respondents cross-appealed on the denial of back-pay. The Seventh Circuit affirmed the decision below on the issue of petitioner's violations of Title VII regarding its promotional policies and practices and approved, except for a minor modification, the broad remedial decree. On the cross-appeal, the Seventh Circuit on the basis of *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), found plaintiffs' claim for class-wide back pay meritorious in light of the finding of class-wide discrimination. The court then enunciated guidelines to be followed in determining back pay, in large part adopting principles that had evolved in a number of cases in the Fifth Circuit. See, e.g., *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *United States* v. *United States Steel Corp.,* 520 F.2d 1043 (5th Cir. 1975). It remanded the matter to the district court "with instructions to award back pay within the constraints of the guidelines . . ." it had announced. (App. 10.)

Petitioner sought rehearing and rehearing en banc, which were denied with no judge in active service requesting a vote. (App. 19). Petitioner did not move that the mandate be stayed pending *certiorari,* and this matter has been proceeding in the district court on remand since January of this year. Pursuant to the decree an EEO committee consisting of three class members and three management representatives, headed by a neutral, has been constituted. At the present time the parties are attempting to negotiate the ground rules for the EEO committee, and steps are being taken with regard to implementation of the remedial decree.

ARGUMENT

I. The Evidence—A Subjective, Informal Promotional System And The Resulting Work Force—Taken As A Whole Supports The Findings Below That Title VII Has Been Violated.

Petitioner asserts that the decision of the district court and the court of appeals are based "solely" on statistics. (Pet. at 1, 13.) This is incorrect. The district court heard the testimony of more than a dozen witnesses as to how promotions were actually made at Broadview. To correct this misimpression and to demonstrate the factual basis for the decision in this case, the facts found at trial are presented below.

Petitioner's Chicago Parts Distribution Center at Broadview, Illinois is essentially a warehouse operation where parts are received both from company and outside suppliers, placed in stock and then shipped to dealers as orders are received. (App. 21.) The Broadview facility, which is General Motors' largest non-union facility in the United States, also serves as the headquarters for the north central region of the Parts Division. (Id.).

The labor force at Broadview is comprised of hourly and salaried workers. The hourly work force is divided into two shifts, a day shift and a night shift. There are six hourly positions at Broadview, of which the most desirable is the position of hourly clerk.[3] (App. 22.) At the time

[3] The hourly clerk position is free from manual labor and allows workers with some education to use their skills. Historically, hourly clerk has served as a stepping stone at Broadview to advancement to salaried positions and supervisory roles. Thus, of the 39 workers whose hourly clerk positions terminated for all reasons (death, retirement, etc.) between 1960 and 1973, 17 were promoted

(Footnote continued)

this suit was brought, although approximately 25 percent of the plant work force was black, blacks were absolutely excluded from the position of hourly clerk at Broadview. (App. 22.) There were twenty-seven hourly clerks, all of whom were white. This racial exclusion continued through the time of trial. In June, 1975, when the case was tried, of the 31 hourly clerks positions 28 were held by whites. As the trial court noted the three black clerks all served on the "less desirable night shift" and all 20 day clerks were white. (Id.)

The trial court expressly rejected date of hire as an explanation for the segregation.[4] (App. 26-28.) Nor could an explanation be found in petitioner's stated, neutral policy that vacancies in hourly clerks positions were to be made on the basis of "ability, merit and capacity." There was absolutely no evidence that black hourly employees as a class had less "ability, merit and capacity" as compared to white hourly employees,[5] and indeed petitioner for some years regularly employed blacks as temporary or relief clerks. In fact, petitioner disclaimed reliance on a merit system at trial. The trial court concluded that petitioner had used an informal, unstructured system favoring whites over blacks for the job, and held petitioner in violation of Title VII in regard to promotions to the hourly clerk position. (App. 28.)

The trial court similarly found that petitioner's promotional practices in filling vacancies in salaried positions at the Broadview facility favored whites over blacks. The court concluded that petitioner's practices taken as a whole "are ripe with susceptibility to discriminatory practices." (App. 30.) Prior experience in a salaried position with petitioner was a prerequisite for consideration for a salaried vacancy in a position above entry level, although petitioner conceded that blacks historically had been denied access to entry level salaried positions. The company at no time provided employees with any description of salaried jobs or any list of the qualifications and prerequisites for salaried positions. (App. 35.) Moreover, the company at no time made any announcements of salaried vacancies to its employees. (Id.)

(Footnote continued)

to salaried positions. As the trial court noted, "the stepping stone nature of the post is even more apparent if the three workers who retired, the two who died and the one who was discharged are eliminated from the total." (App. 22.)

[4] At trial petitioner tried to take refuge in the "bona fide seniority system" defense of section 703(h), 42 U.S.C. § 2000e-2(h). It contended that the complete exclusion of blacks from the position of hourly clerk was the result of whites having uniformly higher seniority than any blacks (evidently because of hiring discrimination now barred by the statute of limitations). However, both the trial and the appellate court rejected this defense, concluding that "the evidence indicates that seniority in fact has often served only an ancillary role in determining promotions to the position of hourly clerk." (App. 23.)

[5] Indeed, several of the named plaintiffs were, if anything, overqualified for the position. Plaintiff Stewart at the time of trial was an eleven-year hourly employee with a bachelors degree, a masters degree, and was working toward his doctorate degree. While in the military he had demonstrated his ability to handle extensive clerical responsibilities and for his work had received commendations from senior officers. Plaintiffs Hatcher and Tolbert were both college graduates, had completed their college education while working at Broadview as hourly employees, and were permanent substitute teachers during the day in the Chicago public school system. Neither was ever offered an opportunity to serve as an hourly clerk.

Instead, the company "seems to rely heavily on supervisory recommendations." (App. 30.) The former plant manager, in uncontroverted testimony, admitted (and the court below found) that it was the foremen who supplied the "two or three critical names" used in the selection process.[6] (App. 32.) But the foremen had no objective information on which to rate the hourly employees, since the only formal reviews were at the supervisory level. Foremen were not provided with written guidelines to use in their evaluations and indeed were not even informed of the specific salaried position for which they were making recommendations, leading the trial court to observe that the foremen "could hardly know what to look for since they never knew the official job description or personnel criteria used." (App. 32.) Instead, foreman were merely told to supply the names of employees with "potential for promotion," a standard found not to be a "meaningful criteria" and one that "easily becomes a subterfuge for discrimination." (App. 34.) Plaintiffs' expert confirmed that the absense of a formal rating system and the lack of objective criteria and foreman guidance contributed to racial bias in the recommendation process.

The salaried work force reflected the results of these promotional practices. There were four salaried depart-

[6] Petitioner had 18 foremen making recommendations and supervising hourly employees at Broadview. Until 1970 the foreman work force was totally segregated; even at the time of trial (and two years after the case was filed) 16 out of the 18 foremen were white. There were four general foremen, and at all times this position had been exclusively white, as were the positions of plant supervisor, office supervisor and plant superintendent. Plaintiffs' expert witness demonstrated that a promotion system bottomed on this sort of recommendation is inherently discriminatory.

ments at Broadview. As of December 1972[7] one of the departments, traffic, had an entirely segregated work force and the number of blacks in the other departments was miniscule:

Department	Number of White Employees	Total Employees	Number of Black Employees
Operations	24	25	1
Office and Clerical	57	59	2
Personnel	7	9	2
Traffic	5	5	0
All Salaried Positions	93	98	5

Any explanation based on the inherent inferiority of blacks for these positions could only be rejected out of hand, and in fact at least four members of the plaintiff class were college graduates.

The trial court thus had before it, in finding a violation of Title VII, substantial evidence on the discriminatory policies of petitioner's promotional practices, as well as the racial composition of the salaried work forces produced by these procedures. Liability was not based "solely" on statistics, as petitioner now claims (Pet. 1, 13), but on a thorough investigation of the actual mechanics of promotions. Certiorari to review the adequacy of the factual conclusions of the trial court about these practices and procedures does not seem warranted, especially since essentially the same subjective and informal promotional policies of this very employer have previously been condemned by two other appellate courts after full trials. *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th

[7] The experience since 1972 to date of trial was found by the trial court not to be "statistically significant." (App. 29.)

Cir. 1972). Employers are routinely found liable under Title VII for similar promotional practices. E.g., *Mueller* v. *United States Steel Corp.*, 509 F.2d 923, 929 (10th Cir. 1974), *cert. denied*, 423 U.S. 825 (1975); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Bolton* v. *Murray Envelope Corp.*, 493 F.2d 191, 193 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

The cases on which petitioner relies (Pet. 16-17) merely restate the principles applied by the Seventh Circuit and the trial court.[8] After a court has identified promotional practices "highly susceptible to abuse" (App. 9), it can verify their illegality by a statistical analysis of the resulting work force. E.g., *Rich* v. *Martin-Marietta Corp.*, 522 F.2d 333 (10th Cir. 1975); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1171-73 (2d Cir. 1972); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972). Cf. *McDonnell Douglas* v. *Green*, 411 U.S. 791, 805 (1973). Petitioner contends (Pet. 17) that the decision below mandated "statistical parity." All that the courts below held was that blacks as well as whites are to have an opportunity for promotion on the basis of merit. Statistics and direct testimony had revealed that in the past and up to the time of trial, petitioner's promotional practices had worked to favor whites and to disadvantage blacks.

[8] Thus, *Hester* v. *Southern Railway Co.*, 497 F.2d 1374 (5th Cir. 1974), recognizes the evidentiary significance of a disparity between blacks in the relevant population and in a particular desired position. *Olson* v. *Philco-Ford*, 531 F.2d 474, 477 (10th Cir. 1976), recognizes that statistics as to recurrent employment decisions may reveal that employment policies and practices in fact discriminate against blacks. *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 271 (10th Cir. 1975), notes that "racial statistics are an entirely appropriate method of proving a prima facie discrimination. . . ."

Far from giving any group a preference, the decisions below merely decreed fair and open procedures—posting of job openings, application forms and procedures, explanations of hiring decisions—so that all would be assured not statistical parity but equal opportunity, the goal of Title VII.

After a full trial on the merits, petitioner was found to employ promotional policies and practices that disadvantaged blacks as compared to whites in promotion to the preferred hourly positions and to salary positions. In reaching this conclusion, both the trial court and the court of appeals took into account substantial direct evidence of the discriminatory potential of petitioner's procedures, which they found confirmed by the work force produced by these procedures. In this, the lower courts were according traditional evidentiary weight to persuasive and relevant evidence and did nothing that could conceivably be said to conflict with the prior decisions of this Court or the more than 120 courts of appeals decisions employing statistical evidence in Title VII. Petitioner's argument boils down to a rehashing of the evidence, not grounds for the grant of certiorari.

II. Evidence Establishing The Discriminatory Impact Of Petitioner's Procedures Is Not Inadmissible Because Of Any Statute of Limitations

Although petitioner has used the same promotional system since at least 1965, it suggests that the applicable statute of limitations barred the courts below from drawing any inferences about the discriminatory impact of the practices from its pre-1969 promotions. Petitioner's argument confuses admissibility of evidence with limitations on causes of action. See *Machinists Local* v. *NLRB*, 362 U.S.

411, 416, 420 & n.11 (1960).[9] Respondents pleaded and proved that petitioner's procedures for filling salaried and hourly clerks' vacancies at the Broadview facility had been unchanged since at least 1965, and that during this earlier period a segregated work force had been produced. Since it tended to explicate the discriminatory potential of those procedures, evidence of racial discrimination at a prior time is relevant and admissible. *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 218 (5th Cir. 1974) (cases collected); *Rogers* v. *International Paper Co.*, 510 F.2d 1340, 1347 (8th Cir. 1975).[10]

III. Evidence Other Than Comparing White Incumbents With Black Class Members Was Probative On The Discriminatory Impact Of Petitioner's Policies

Petitioner contends that under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the respondent class could establish discrimination only by demonstrating each individual promotional decision was discriminatory. But an employee-by-employee matching was, as the Court of Appeals observed, impossible "because General Motors had no objective standards by which to measure whether a given

[9] This distinction has long been drawn in NLRA proceedings. Section 10(b) of the NLRA, 29 U.S.C. §160(b), the parallel provision to Title VII's limitations provision, 42 U.S.C. §2000e-5(e), "enacts a statute of limitations, not a rule of evidence." *Allen Mfg. Co.*, 88 N.L.R.B. 761, 766 (1952). Evidence as to events in the barred period can be used to illuminate current conduct in and of itself charged to be unlawful. See generally *Machinists Local* v. *NLRB*, 362 U.S. 411, 420 & n.11 (1960) (cases collected).

[10] Indeed, it does not appear that petitioner made any objection to questions addressed to its foremen and former plant manager on pre-1969 procedures.

employee deserved a promotion . . . ." (App. 13.) Petitioner can hardly limit respondents to a mode of proof that its own wrongdoing had rendered unavailable.

McDonnell Douglas requires no such departure from traditional modes of proof. As the courts below noted (App. 9, 34), racial discrimination in a class action in inferable from procedures with a propensity to unfairness and subjectivity and from the resulting racial disparity in preferable positions: since comparative ability is not at issue, discriminatory procedures are the only explanation for why whites have the jobs and blacks do not. *McDonnell Douglas*, in contrast, was an individual action brought by a discharged employee challenging the employer's refusal to rehire him after it advertised an opening in his former position. Evidence of the particular hiring decision in the position sought and refused was at the heart of Green's individual claim. *McDonnell Douglas* was expressly limited to "a private nonclass" action, 402 U.S. at 800, and the Court noted that the elements of proof will vary in other Title VII actions and that statistical evidence is a useful indicator of patterns of discriminatory practice. 411 U.S. at 802 n. 13, 805. Court after court has, therefore, held since *McDonnell Douglas* that in class Title VII cases, evidence of wholesale exclusion creates the same inference of impermissible procedures as do facts regarding particular hiring decisions. See, *e.g.*, *Jones* v. *Lee-Way Motor Freight Inc.*, 431 F.2d 245 (10th Cir. 1970); *Herrera* v. *Yellow Freight System*, 505 F.2d 66 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1317 (7th Cir. 1974).

IV. The Court Of Appeals' Guidelines For The Award Of Back Pay Follow Conventional Principals In Assessing Damages

On respondents' cross appeal on denial of back pay, the Seventh Circuit's analysis was conventional. It first inquired whether back pay should be awarded on an individual basis to particular employees or on a class-wide basis, with a lump-sum award to be divided among eligible class members. (App. 12.) It noted that an individual remedy should be used if it will best compensate the victims of discrimination without penalizing the employer, and held that individual awards based on seniority should be made in regard to promotions to hourly clerk. It found, however, that "because General Motors had no objective standards by which to measure whether a given employee deserved a promotion (App. 13)," it was impossible to decide in individual cases whether but for racial discrimination a particular person would have been promoted to a salaried position. Rather than achieving greater accuracy, individual awards in the case of salary promotions would necessarily involve a "quagmire of hypothetical judgments (App. 13)," in which there is nothing approaching accuracy and the only result would be petitioner escaping its obligations to make members of the respondent class whole.

The Seventh Circuit therefore held that the district court should first identify those black hourly employees who by virtue of their education, their training or other factors are eligible for salaried back pay at the Broadview facility. Petitioner then has an opportunity to show that these employees would not have received salaried positions because of factors unrelated to discrimination. (App. 14.) It is among those persons who survive petitioner's proof

to whom a "class-wide" award is to be made. Although petitioner's total dollar liability is to be calculated by comparing over time groups of like employees, contrary to its suggestion (Pet. 25) it will have a full opportunity to demonstrate that any individual should not be entitled to participate in the class-wide award, thereby according full due process. Moreover, the mechanics of computing the dollar amount to those class members who were disadvantaged is consistent with Title VII's make-whole remedy and in fact employs techniques developed in a number of other circuits where the employer's wrongdoing makes a more precise form of dollar amount calculation impossible. E.g., *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1055-56 (5th Cir. 1975); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 801-2 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971); *Senter* v. *General Motors Corp.*, 383 F. Supp. 222, 229 (S.D. Ohio 1974), *aff'd*, 532 F.2d 511 (6th Cir. 1976); *United States* v. *Local 416, Wire & Metal Lathers*, 328 F. Supp. 429, 443-45 (S.D. N.Y. 1971).

CONCLUSION

For the reasons here stated, it is respectfully submitted that a writ of certiorari be denied.

THOMAS R. MEITES, ESQ.
33 North Dearborn, Suite 1410
Chicago, Illinois 60602

FREDA R. MERRITT, ESQ.
30 West Washington, Suite 1339
Chicago, Illinois 60602

Attorneys for Respondents

Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1209

In the

Supreme Court of the United States

OCTOBER TERM, 1976

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

JOE STEWART, ROY TOLBERT, JO ANN KELSEY, ISAIAH HATCHER, and ARTIS OSBORNE For Themselves and For All Other Persons Similarly Situated,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Seventh Circuit

MICHAEL A. WARNER
PATRICIA A. BRANDIN
69 West Washington Street
Suite 3200
Chicago, Illinois 60602

FRAZER F. HILDER
EUGENE L. HARTWIG
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Counsel for the Petitioner,
GENERAL MOTORS CORPORATION

Of Counsel:
POPE, BALLARD, SHEPARD & FOWLE
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4200

The Scheffer Press, Inc.—(312) 263-6850

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

Petitioner respectfully moves that this Court (1) vacate its denial of the Petition for Writ of Certiorari entered on June 29, 1977, (2) grant the Petition, and (3) remand the case to the Court of Appeals for reconsideration in light of *Hazelwood School District* v. *United States,* No. 76-225 (6/27/77); *Teamsters* v. *United States,* No. 75-636 (5/31/77); and *United Air Lines, Inc.* v. *Evans,* No. 76-333 (5/31/77), or, in the alternative, accept the case for full review.

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, in which the Court of Appeals affirmed a finding that Petitioner discriminated against a class of black hourly rated employees in promotions. The decisions in *Hazelwood School District, Teamsters,* and *United Air Lines* were rendered after the decision by the Court of Appeals and the filing of the Petition for Certiorari herein. These decisions are intervening circumstances of substantial and controlling effect which were not previously presented to this Court by Petitioner.

This Court issued its decision in *Hazelwood School District* only two days before the Petition for Certiorari herein was denied. That case was remanded because the "Court of Appeals totally disregarded the possibility that [the] prima facie statistical proof in the record might at the trial level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII [on March 24, 1972]." Slip Opinion at p. 9. As this Court noted, "once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show 'that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination.'" *Id.* at p. 10.

In this case, the Court of Appeals found a prima facie case of discrimination in the promotion of black hourly employees to salaried positions based on a statistical disparity between the percentage of blacks in salaried positions (9%) as compared to the percentage of whites in salaried positions (21%). The first ground for error cited by Petitioner in its Petition for Certiorari was that the Court of Appeals disregarded undisputed evidence that the *rate of promotion* of blacks to the higher rated positions *exceeded* the ratio of blacks in the work force during the period at issue. See, Pet. For Cert. 13-18.

The period at issue in this case is 1969 to the date of trial because (1) the plaintiffs' complaint was limited to a claim of discrimination based on acts of alleged discrimination occurring since 1969 (see, Pet. For Cert., p. 4),[1] and (2) the applicable limitation periods under Title VII and 42 U.S.C. §1981 preclude a claim of discrimination prior to 1969. See, Pet. For Cert., pp. 19-20. That 1969 is the applicable cut-off date in this action is confirmed by this Court's holding in *United Air Lines, Inc.* v. *Evans,* No. 76-333, that "a discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." Slip Opinion at p. 5.[2]

In response to the work force statistics relied upon by plaintiffs, it was established without dispute that since January 1, 1969 *all five* hourly employees promoted from hourly positions to salaried positions *were black class members.* Even taking account of outside hires, the rate of placement of blacks in salaried vacancies for which class members might possibly have been qualified was:

> 1/1/69 to 8/31/73 (the date suit was filed) —6 blacks out of 14 vacancies or 42.8%.
>
> 1/1/69 to 5/27/75 (the date of trial) — 9 blacks out of 19 vacancies or 47.4%.

Throughout the period from January 1, 1969 to the date of trial, blacks averaged approximately 25% of the hourly work force. See, Pet. For Cert., p. 5; Add. A.

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[1] Because the plaintiffs' complaint was limited to post-1969 discrimination, unlike *Hazelwood,* there was no evidence presented and no specific finding with respect to pre-1969 discrimination. *Id.*

[2] See also, *Teamsters* v. *United States,* No. 75-636. Slip Opinion, p. 21, n. 30.

Under the authority of *Hazelwood School District*, therefore, the District Court and the Court of Appeals should have examined the statistics on the rate of promotion of blacks since 1969 because those statistics show that the prima facie case "established by statistical work force disparities" was rebutted by undisputed evidence that the "claimed discriminatory pattern" could only have been the product of pre-1969 events, rather than unlawful discrimination. See, Pet. For Cert., pp. 13-18. Accordingly, Petitioner respectfully submits that *Hazelwood* is controlling authority with respect to the matters at issue in this case. At the minimum, a remand of this case is necessary with directions to the Court of Appeals to consider the impact of the statistics on the rate of promotions during the relevant period.

Indeed, it is submitted that the evidence in this case provides an even stronger basis for reconsideration than in *Hazelwood* because the work force statistical disparities were the only evidence of discrimination cited by the Court of Appeals.[3] Unlike *Hazelwood*:

(1) None of the individual plaintiffs proved discrimination. As the District Court found, the individual plaintiffs "failed to indicate that they were more qualified than the individuals actually advanced during this period." See, Pet. For Cert., pp. 5, 20-21.

[3] Although the Court of Appeals purported to support its decision by finding that defendant's promotional policies were "highly subjective and loosely structured" and, therefore, "susceptible to abuse," even if true, which Petitioner denies, subjective and loosely structured procedures are not inherently discriminatory. Promotional policies are only unlawful if they result in disparite treatment, but here the undisputed statistics on the rate of black advancement show that the policies, no matter how characterized, benefitted blacks. See, Pet. For Cert., pp. 5-6 n. 6.

(2) No evidence was offered that any other member of the class of black hourly employees was qualified for, but denied placement in any salaried vacancy which had been filled by a white. *Id.*

(3) The District Court and Court of Appeals ignored detailed and undisputed rebuttal evidence on the manner in which *each vacancy* was filled during the period Petitioner was charged with discrimination. That evidence established that each vacancy not filled by a black was filled only after affirmative efforts to seek out qualified blacks failed to locate a black with qualifications equal to or greater than those of competing whites. See, Pet. For Cert., pp. 5-7, 21-23; Add. B.

In *Teamsters* v. *United States*, No. 75-636 (5/31/77), this Court stated that it is the plaintiff's burden to "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." Slip Opinion at 10. With respect to statistics, this Court cautioned (Slip Opinion at 14):

> "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."

As the foregoing shows, the District Court and the Court of Appeals not only erred in failing to consider the rebuttal statistics, but also erred in ignoring other relevant facts, circumstances, and rebuttal evidence which clearly refute any finding that racial discrimination was Petitioner's "standard operating procedure."

CONCLUSION

Based on the foregoing and the grounds stated in the Petition for Writ of Certiorari, Petitioner respectfully requests that the Order denying said Petition be reconsidered and that this case be remanded for consideration of Petitioner's statistical and other rebuttal evidence in light of this Court's decisions in *Hazelwood School District* v. *United States,* No. 76-255; *Teamsters* v. *United States,* No. 75-636; and *United Air Lines, Inc.* v. *Evans,* No. 76-333 or, in the alternative, that this case be accepted for full review by this Court.

Respectfully submitted,

MICHAEL A. WARNER
PATRICIA A. BRANDIN
Suite 3200
69 West Washington Street
Chicago, Illinois 60602

FRAZER F. HILDER
EUGENE L. HARTWIG
LOUIS H. LINDEMAN, JR.
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Counsel for the Petitioner,
GENERAL MOTORS CORPORATION

Of Counsel:
POPE, BALLARD, SHEPARD & FOWLE
69 West Washington Street
Chicago, Illinois 60602
(312) 630-4200

CERTIFICATE OF COUNSEL

Michael A. Warner, having been first duly sworn on oath, deposes and states as follows:

1. I am one of the attorneys for Petitioner General Motors Corporation. This Certificate is filed pursuant to Rule 58(a) of the Rules for the Supreme Court of the United States in support of Petitioner's Petition for Rehearing of Order Denying Petition for Writ of Certiorari.

2. This Petition is filed in good faith and not for purposes of delay. In this regard, it is noted that the Decree entered in this matter has not been stayed pending action on the Petition for Writ of Certiorari.

3. The grounds stated in the Petition are limited to intervening circumstances—specifically, the controlling or substantial effect of this Court's recent decisions in *Hazelwood School District* v. *United States,* No. 76-255 (6/27/77); *Teamsters* v. *United States,* No. 75-636 (5/31/77); and *United Air Lines* v. *Evans,* No. 76-333 (5/31/77), all of which were decided subsequent to the filing of the Petition for Writ of Certiorari herein.

/s/ Michael A. Warner
Michael A. Warner
One of the Attorneys for Petitioner, General Motors Corporation

Subscribed and Sworn to
before me this 19th day
of July, 1977.

/s/ Mary Lou Ryan
Notary Public